ATTACHMENT 2

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October 2, 2009

Via Hand Delivery

Marlene Dortch
Secretary
Federal Communications Commission
c/o Natek, Inc.
236 Massachusetts Avenue, NE
Suite 110
Washington, DC 20002

REDACTED – FOR PUBLIC INSPECTION

Re: AT&T Services, Inc. v. Madison Square Garden, L.P., CSR-8196-P

Dear Ms. Dortch:

Pursuant to the protective order entered in this proceeding on August 28, 2009, please find the Reply in Support of Program Access and Section 628(b) Complaint of AT&T Services, Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut ("Reply"). The Reply itself contains no Highly Confidential information and thus is not redacted. A Reply Declaration attached to the Reply does, however, contain Highly Confidential information. The Reply Declaration submitted here is therefore submitted in a redacted form. A Highly Confidential version of the Reply Declaration has been filed with the Commission. Copies of the public version of the Reply and the Reply Declaration have been served upon Cablevision Systems Corp., Madison Square Garden, L.P., and outside counsel of record for defendants.

If you have questions, please feel free to contact me at (202) 326-7944.

Sincerely,

Kelly P. Dunbar

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

AT&T SERVICES, INC. AND SOUTHERN NEW ENGLAND TELEPHONE COMPANY D/B/A AT&T CONNECTICUT, Complainants, v. MADISON SQUARE GARDEN, L.P. AND CABLEVISION SYSTEMS CORP., Defendants.	File No. CSR-8196-P

To: The Commission

AT&T'S REPLY IN SUPPORT OF PROGRAM ACCESS AND SECTION 628(b) COMPLAINT

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I. INTRODUCTION

Section 628(b) of the Communications Act broadly prohibits "unfair methods of competition" that have "the purpose or effect" of "hinder[ing] significantly" or "prevent[ing]" the provisioning of multichannel video programming distributor ("MVPD") service. 47 U.S.C. § 548(b); *see National Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009) ("*NCTA*"). AT&T's Complaint establishes that Cablevision Systems Corp. and Madison Square Garden, L.P. (collectively "Cablevision" unless otherwise noted), have violated Section 628(b) by selectively refusing to license to AT&T the high-definition ("HD") format of MSG and MSG Plus – the must-have format of regional sports network ("RSN") programming this Commission has recognized time and again is essential to new entrants' ability to compete. In its Answer, Cablevision admits the facts necessary to establish a violation of Section 628(b): that Cablevision makes the HD format of MSG and MSG Plus available to some MVPDs (including several against which it competes directly), but that it denies the HD format to others (namely, wireline competitors with the potential to bring meaningful competition to cable incumbents); that there is no price at which Cablevision will license the HD format of MSG and MSG Plus to AT&T; and that Cablevision's selective refusal to deal (and its attendant sacrifice of licensing and advertising revenue) makes sense *only* because it impairs AT&T's ability to win and keep subscribers. Cablevision's conduct falls squarely within the ambit of Section 628(b).

Cablevision's principal response is to deny that any of this matters. That is so because the HD format of MSG and MSG Plus is delivered terrestrially and, therefore, is not condemned by the *per se* rules under Section 628(c). But, even assuming that Cablevision is correct that its conduct is outside the scope of Section 628(c), it is wrong to claim that it is thereby exempt from scrutiny under Section 628(b). Section 628(b) is a broad prohibition on unfair methods of competition that have the purpose or effect of hindering the provisioning of competing MVPD

service, and, as both this Commission and the D.C. Circuit have squarely held, its sweep is in no way defined by the "minimum" content of regulations promulgated under Section 628(c). Cablevision's other arguments – for example, that Cablevision's admitted attempts to impair AT&T's ability to compete through the denial of must-have programming can be defended as "product differentiation," and that those attempts have not succeeded in excluding AT&T from the market – are wrong on the facts and the law.

In addition to its claim under Section 628(b), AT&T also has alleged facts that, taken in connection with Cablevision's own admissions, establish independent violations of Section 628 for an unreasonable refusal to sell, unlawful evasion of the program access rules, undue influence in the terms and conditions of program access, and discrimination. At the least, discovery will be necessary to test the merits of Cablevision's defenses to these claims.

As AT&T has requested in its Complaint, the Commission should rule on the claims presented here – in particular, AT&T's claim under Section 628(b) – expeditiously and no later than within five months. As the Complaint, Cablevision's Answer, and this Reply make demonstrably clear, competition is hindered – and consumers suffer – with each passing day that Cablevision continues to deny the HD format of must-have programming to AT&T.

II. CABLEVISION'S REFUSAL TO DEAL VIOLATES SECTION 628(b) AND THE COMMISSION'S IMPLEMENTING RULES

A. The Purpose and Effect of Cablevision's Refusal to Deal Is to Impair AT&T's Ability to Provide Competing Satellite-Delivered Programming to Subscribers and Consumers

Section 628(b) prohibits "unfair" practices that have the "purpose or effect" of hindering a competing MVPD from providing video services to subscribers. In Count I, AT&T has established that Cablevision's refusal to license the HD format (a must-have format) of MSG and

MSG Plus (must-have programming), which Cablevision does license to other MVPDs, is an unfair practice in violation of Section 628(b). *See* AT&T Compl.[1] ¶¶ 78-88.

First, Cablevision's conduct has the "purpose" of hindering AT&T's ability to provide satellite cable programming to subscribers. *See* AT&T Compl. ¶¶ 64-67. As the Commission recently argued to the D.C. Circuit, "cable operators have an [] incentive to withhold programming in order to frustrate new entry by incumbent telephone companies." FCC Cablevision Br.[2] at 20. That is precisely the case here: Cablevision is aware of the competitive importance of the HD format of MSG and MSG Plus and it lacks any legitimate business justification for failing to license this programming to AT&T *other than* its desire to prevent AT&T from keeping and winning subscribers. Indeed, far from contradicting this point, Cablevision's experts acknowledge that "[t]here is no doubt that AT&T would be better off . . . if MSG HD and MSG+ HD were available to it," Bulow & Owen[3] at 3, and that, by refusing to provide the HD format to AT&T, "Cablevision hopes to gain a marketing advantage amongst a group of local sports fans who will regard the availability of MSG HD and MSG+ HD as a selling point in Cablevision's favor relative to AT&T," *id.* at 7.

Second, Cablevision's conduct has the "effect" of hindering AT&T's ability to provide satellite cable programming to subscribers. *See* AT&T Compl. ¶¶ 55-63. This Commission recently emphasized the concrete harm deprivation of must-have programming has on new wireline competitors. "New MVPD entrants, such as telephone companies," the Commission

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[1] Program Access and Section 628(b) Complaint, *AT&T Services, Inc. v. Madison Square Garden, L.P.*, File No. CSR-8196-P (filed Aug. 13, 2009) ("AT&T Compl.").

[2] Brief for Respondents, *Cablevision Systems Corporation v. FCC*, Nos. 07-1425 & 07-1487 (filed Aug. 13, 2008) ("FCC Cablevision Br.").

[3] Jeremy I. Bulow and Bruce M. Owen, *Analysis of Competition and Consumer Welfare Issues in AT&T's Program Access and 628(b) Complaint Against Cablevision and Madison Square Garden* (attached as Ex. 1 to Cablevision Answer) ("Bulow & Owen").

explained, "have barely a foothold. . . . These new entrants depend on access to cable-owned networks to develop compelling program packages and attract subscribers. . . . And because new entrants have no established customer base . . . they are particularly vulnerable to competitive harm if, through withholding, cable incumbents are able to degrade the quality of their programming packages." FCC Cablevision Br. at 40 (internal quotation marks and citations omitted); *see 2007 Order*[4] ¶ 60 (describing the particularly strong incentives to "withhold[] programming from recent entrants"). As AT&T has explained, RSNs such as MSG and MSG Plus are must-have programming, *see* AT&T Compl. ¶¶ 56-57, and the HD format of this programming is crucial to compete effectively, *see id.* ¶¶ 58-61 – each of which is evidenced by the fact that Cablevision has chosen the HD format of RSN programming (alone among Cablevision-affiliated programming) to deny outright to AT&T, *see id.* ¶ 62.

Third, Cablevision's conduct is an "unfair method[] of competition." *See* AT&T Compl. ¶¶ 68-73. Cablevision has acknowledged that its programming arm, Madison Square Garden, L.P. ("Madison Square Garden"), has made the HD formats of MSG and MSG Plus available to some MVPDs, but that it has withheld it from others, such as AT&T, that are uniquely situated to provide meaningful video competition.[5] A selective refusal to deal with some competitors but not others by a defendant with a dominant market position can constitute anticompetitive conduct even when the defendant would be free to refuse to deal at all with any customers. *See*

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[4] Report and Order and Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 17791 (2007) ("*2007 Order*").

[5] Cablevision's experts acknowledge, for example, that Cablevision is engaged in a "selective licensing strategy, not a general policy" of "exclusivity." Bulow & Owen at 2; *see id.* at 3 ("Cablevision/MSG does not follow a policy of strict exclusivity, even in connection with terrestrial carriage. Instead, it appears to pursue a less restrictive selective licensing strategy, choosing to license to some but not other distributors for MSG HD and MSG+ HD both within its own cable franchise areas and outside them.").

Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); *Verizon Commc'ns, Inc. v Law Offices of Curtis V. Trinko*, 540 U.S. 398, 410 (2004). That there is apparently no price at which Cablevision will deal with AT&T, *see* Levine Decl.[6] ¶ 12 ("AT&T's counterproposal was a non-starter, since it had previously been made clear to AT&T that MSG would not provide AT&T with a license to carry MSG HD and MSG+ HD"), independently establishes that Cablevision is sacrificing the potential revenues of Madison Square Garden only for the purpose of imposing competitive harm on AT&T.

Furthermore, in the *MDU Order*, this Commission held a practice is "unfair" where it "impede[s] the entry of competitors into the market and foreclose[s] competition based on the quality or price of competing service offerings." *MDU Order*[7] ¶ 43. Here, Cablevision's conduct impedes AT&T's ability to compete in the market by locking up a substantial subset of subscribers for whom the HD format of RSN programming is a crucial part of a programming lineup. AT&T is effectively foreclosed from competing for those subscribers on any terms because of the unique and non-replicable nature of RSN programming, and the importance of providing that programming in the HD format. *See* Joint Decl.[8] ¶¶ 10-12.

The unfair and anticompetitive nature of Cablevision's refusal to deal is also evidenced by the fact that Cablevision is attempting to force AT&T to pursue a two-level entry strategy. Cablevision's stated intent is to force AT&T to compete in the RSN video programming

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[6] Declaration of Adam Levine, *AT&T Services, Inc. v. Madison Square Garden, L.P.*, File No. CSR-8196-P (Sept. 17, 2009) ("Levine Decl.") (attached as Ex. 3 to Cablevision Answer).

[7] Report and Order and Further Notice of Proposed Rulemaking, *Exclusive Service Contracts for Provision of Video Service in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235 (2007) ("*MDU Order*"), *aff'd*, *National Cable & Telecomm. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

[8] Joint Declaration in Support of Program Access and Section 628(b) Complaint, *AT&T Services, Inc. v. Madison Square Garden, L.P.*, File No. CSR-8196-P (Aug. 13, 2009) ("Joint Decl.") (attached as Ex. 2 to AT&T Compl.).

marketplace – or even to require the purchase of professional sports franchises outright (given Cablevision's ownership of the New York Knicks and the New York Rangers) – as a price of entry into the MVPD marketplace. *See* Answer[9] at 56 (noting other MVPDs have developed unique programming content and "[t]here is no reason why AT&T cannot do the same"). But forcing new entrants to enter two markets in order to compete in one is paradigmatic anticompetitive conduct. *See* AT&T Compl. ¶ 73 & n.52. That is especially the case here: Cablevision's gatekeeper control over access to the lion's share of subscribers in key areas of Connecticut would frustrate the economic viability of any regional programming AT&T developed. *See infra* pp. 27-28.

B. Cablevision's Contrary Arguments Are Unavailing

1. Section 628(c) Does Not Define the Full Scope of Conduct Condemned Under Section 628(b)

Cablevision's lead defense of its refusal to license the HD format of must-have programming is that, if Cablevision's conduct is not proscribed under the program access duties in Section 628*(c)* (a point AT&T addresses below), then its conduct is necessarily immune under Section 628*(b)* as well. *See* Answer at 26 ("Because Defendants have full discretion" under Section 628(c) "to choose whether or not to license terrestrially-delivered MSG HD and MSG+ HD, there is no legal basis for the Commission to find that the decision not to license that programming to AT&T violates Section 628(b)."); *id.* at 26-29. Cablevision is wrong: the text, structure, history, and purpose of Section 628 make clear that Section 628(b) broadly prohibits unfair conduct that impairs the delivery of competitive video services regardless whether such conduct is proscribed by Section 628(c).

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[9] Answer to Program Access Complaint, *AT&T Services, Inc. v. Madison Square Garden, L.P.*, File No. CSR-8196-P (Sept. 17, 2009) ("Answer").

a. Construction of the scope of Section 628(b) should "begin[], as always, with the plain language of the statute." *NCTA*, 567 F.3d at 664 (internal quotation marks omitted). Section 628(b)'s text is conspicuously broad: it prohibits all "unfair methods of competition" that have the "purpose or effect of . . . hinder[ing] significantly or . . . prevent[ing]" a competing MVPD "from providing satellite cable programming . . . to subscribers or consumers." 47 U.S.C. § 548(b). Nothing on the face of the provision even arguably limits its sweep to those specific practices identified in Section 628(c).

In fact, the D.C. Circuit recently held that this provision, by its "plain terms," "prohibit[s] cable company practices with the purpose or effect of preventing competing MVPDs . . . from providing the two predominant types of programming to consumers" – namely "satellite cable programming" and "satellite broadcast programming." *NCTA*, 567 F.3d at 662. The D.C. Circuit rejected the argument – espoused by Cablevision here – that the concern of Section 628(b) was "not with barriers to service" but with "practices that prevent cable competitors from obtaining certain kinds of programming that the American public wants to watch." *Id.* at 663 (emphasis omitted). The court of appeals held that Section 628(b) is written in "broad and sweeping terms" and that it covers all "practices having an anticompetitive effect on [MVPD] service." *Id.* at 664. Accordingly, after *NCTA*, there can be no serious question that Section 628(b) is expansive and reaches practices that impede competitors' ability to provide satellite-delivered programming as Cablevision's conduct does.[10]

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[10] *See* First Report and Order, *Implementation of Sections 12 and 19 of the Cable Television Protection and Competition Act of 1992*, 8 FCC Rcd 3359, ¶ 41 (1993) ("*First Report and Order*") ("Section 628(b) is a clear repository of Commission jurisdiction" to address conduct that "emerge[s] as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming.").

Cablevision insists that nothing in *NCTA* "offers any basis for allowing the Commission to override express and specific limitations on the scope of its authority in Section 628 established by Congress." Answer at 29. But, as explained, Section 628(b) contains no "express" or "specific" limitation: it reaches practices by "cable operator[s]" that have the purpose or effect of hindering or preventing the provisioning of competitive video service.

Cablevision also argues that *NCTA* is distinguishable, but each distinction reduces to its conclusory claim that, in that case, an exclusive multi-dwelling unit ("MDU") provision prevented competing MVPDs from "providing any and all satellite cable programming to [a] building," whereas, in this one, refusing to license the HD format of MSG and MSG Plus purportedly "does not foreclose AT&T from offering service . . . to any subscribers." Answer at 31; *see id.* (noting "[t]he practice found by the court to be cognizable under Section 628(b) . . . entirely foreclosed competing MVPDs from providing any service" to certain customers); *id.* at 32 (noting "MDU exclusivity" "foreclose[d] all competitive MVPDs from providing any service" to customers in particular MDUs). Apart from the fact this proposed distinction has no basis in the text of Section 628(b), it is no distinction at all: as explained below, Cablevision's refusal to license the HD format of MSG and MSG Plus has both the purpose and effect of foreclosing AT&T from competing for that universe of subscribers who demand the HD format of RSN programming, which is a significant and growing segment of consumers. Indeed, were it not for this foreclosure effect, Cablevision would have no incentive to refuse to license the HD format to AT&T (as Madison Square Garden would benefit from increased license fees and advertising revenues). *See* AT&T Compl. ¶ 62. AT&T is accordingly "hinder[ed]" and "prevent[ed]" from providing video service to a subset of potential subscribers (sports fans) just

as MDU exclusivity provisions prevented MVPDs from providing service to a subset of potential subscribers (MDU residents). 47 U.S.C. § 548(b).[11]

b. The conclusion that Section 628(b) reaches conduct not covered by Section 628(c) also is compelled by the structure of Section 628. First, Section 628(b) applies to all cable operators; Section 628(c) applies only to vertically integrated operators. On its face, then, Section 628(b) is broader than Section 628(c).[12] Second, Section 628(c) does not require an independent showing of competitive harm – it identifies practices that are *per se* violations of Section 628.[13] Third, the reference in 628(c) to the "minimum contents" of regulations shows that Section 628(c) sets a regulatory floor, not a ceiling. As the D.C. Circuit has explained, "[S]ection 628(c) describes only the '[m]inimum contents of regulations,' . . . and . . . Congress's enumeration of specific, required regulations in subsection (c) actually suggests that Congress intended subsection (b)'s generic language to cover a *broader field*." *NCTA*, 567 F.3d at 664-65

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[11] Cablevision argues that Section 628(b) speaks of "satellite cable programming," Answer at 28, but that term does not limit the scope of conduct that may be deemed "unfair methods of competition." As AT&T has explained, Cablevision's selective refusal to deal has the purpose or effect of hindering AT&T's ability to provide "satellite cable programming," *see* AT&T Compl. ¶¶ 84-88, which is all the statute requires.

[12] *See First Report and Order* ¶ 10 ("a cable operator . . . may become subject to [Section 628(b)] of the 1992 Cable Act even if they are not vertically integrated"; whereas "the more specific proscriptions in Section 628(c) . . . apply to vertically integrated cable operators"). Because there is no question that Cablevision is a "cable operator" – and setting aside that MSG and MSG Plus are also "satellite cable programmers" – Cablevision is wrong that 628(b) does not apply by its terms. *See* Answer at 29-30 (arguing that Section 628(b) cannot be read "to apply to non-designated entities, such as terrestrial programmers").

[13] *See First Report and Order* ¶ 12 ("We will not require complainants alleging violations of the specific prohibitions in Section 628(c) . . . to make a threshold showing that they have suffered harm as a result of the proscribed conduct. In this regard, we are persuaded that Congress has already determined that such violations result in harm."); *id.* ¶ 47 ("Congress did not intend to place a threshold burden on aggrieved MVPDs to show either specific or generalized harm to competition in those circumstances specifically proscribed in subsection (c). . . . . [I]f behavior meets the definitions of the activities proscribed in subsection (c), such practices are implicitly harmful.").

(emphasis added and citations omitted). Fourth, Section 628's remedial provisions make clear that conduct can independently violate Section 628(b) *or* Section 628(c). *See* 47 U.S.C. § 548(d) (an MPVD "aggrieved by conduct that it alleges constitutes a violation of *subsection (b)* of this section, *or* the regulations of the Commission under *subsection (c)* of this section, may commence an adjudicatory proceeding at the Commission") (emphases added).

In light of these structural features of Section 628, Cablevision's argument that the general grant of authority in Section 628(b) cannot trump the specific limitations in Section 628(c) lacks merit. *See* Answer at 30. Section 628(b) and Section 628(c) have different scopes and accomplish different objectives; that something not proscribed under Section 628(c) can nevertheless be unlawful under Section 628(b) follows necessarily from the text and structure of the statute.

c. Cablevision's interpretation of Section 628(b) is also inconsistent with the history and purposes of the Cable Act. In the 1992 Cable Act, Congress considered whether to ban vertical integration outright. Rather than doing so, Congress required the Commission to adopt rules governing the conduct of cable operators and video programmers that choose to become vertically integrated. Congress did so based on its findings that vertical integration would create inexorable pressures for vertically integrated entities to discriminate on the basis of affiliation.[14] Furthermore, Congress required the Commission to adopt regulations "prevent[ing] a cable operator . . . from requiring a financial interest in a program service as a condition of carriage." 47 U.S.C. § 536(a)(1). On the programming side, Congress instructed the Commission to regulate the practices of vertically integrated programmers by, among other things, prohibiting

[14] *See First Report and Order* ¶ 21 ("Congress . . . concluded that vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other multichannel programming distributors.").

discrimination and exclusive contracts. *See id.* § 548(c). A key purpose of these regulations was "to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market." *Id.* § 548(a).

The history and purposes of the Cable Act thus demonstrate Congress's concern with comprehensively policing the practice of vertically integrated firms to ensure competition and diversity. Cablevision's reading of Section 628(b) – that the provision imposes no greater limits than those imposed under Section 628(c) – countermands those congressional objectives.

d. Cablevision makes no serious effort to address the text, structure, history, or purposes of Section 628(b). Instead, it insists that Commission precedent compels the conclusion that conduct not proscribed under Section 628(c) is necessarily immune from scrutiny under Section 628(b). But Commission precedent does not support this view.

First, the *MDU Order* – affirmed by the D.C. Circuit – gainsays this narrow interpretation of 628(b). There, the Commission held the prohibition on "unfair . . . practice[s]" reaches conduct that "can be used to impede the entry of competitors into the market and foreclose competition based on the quality and price of competing service offerings." *MDU Order* ¶ 43. As AT&T has explained, those conditions are implicated here. *See supra* p. 5. And, as the Commission's most recent precedent, the *MDU Order* should govern here.[15]

Cablevision is therefore wrong that "[t]he Commission has ruled repeatedly that Section 628(b) cannot be applied to outlaw conduct otherwise permitted under the Commission's rules." Answer at 5. Prior to the *MDU Order*, the Commission's rules (including Section 628(c)) did not outlaw or regulate exclusive contracts between MDU owners and cable companies; the

[15] Moreover, in the first order implementing Section 628, the Commission explained that "subsection [c] includes only the minimum required regulations to be promulgated by the Commission under 628(b), and is not intended to be entirely inclusive." *First Report and Order* ¶ 29.

Commission and the D.C. Circuit nevertheless held that such contracts – which are far more removed from the core regulatory agenda of the Commission than terrestrial video programming – could be regulated under Section 628(b).

Second, the pre-*MDU Order* precedent Cablevision cites (Answer at 22 n.69) does not support its argument. Many of the orders concern the scope of Section 628(c), not Section 628(b) – which is the subject of Count I.[16] As explained above, there is no defensible argument that Section 628(c) defines the scope of what is prohibited under Section 628(b).

The Commission precedent involving Section 628(b) to which Cablevision points simply held – on the facts of those cases – that, standing alone, a failure to supply terrestrial programming to a rival was not a *per se* "unfair" practice under Section 628(b).[17] But here –

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[16] *See* Memorandum Opinion and Order, *DirecTV, Inc. v. Comcast Corporation*, 13 FCC Rcd 21822, ¶ 25 (1998) (interpreting "Section 628(c)" as "limit[ed]" to "the provision to satellite services"); Memorandum Opinion and Order, *EchoStar Communications Corporation v. Comcast Corporation*, 14 FCC Rcd 2089, ¶ 21 (1999) ("*EchoStar Order*") (same); Report and Order, *Implementation of the Cable Television and Competition Act of 1992*, 17 FCC Rcd 12124, ¶ 73 (2002) ("*2002 Order*") ("the Commission has concluded that the language of Section 628(c) expressly applies to satellite cable programming" and "that terrestrially delivered programming is outside the direct coverage of Section 628(c)") (internal quotation marks omitted); *2007 Order* ¶ 78 (declining to extend Section 628(c) to terrestrial programming).

[17] *See* Memorandum Opinion and Order, *RCN Telecom Services of New York, Inc. v Cablevision Systems Corporation*, 14 FCC Rcd 17093, ¶ 25 (1999) (based on the record and, "standing alone, Defendants' decision to deliver the overflow programming terrestrially via the Metrochannels and to deny that programming to Complainants" was not "'unfair' under Section 628(b)") (emphasis omitted); Memorandum Opinion and Order, *DirecTV, Inc. v. Comcast Corporation*, 15 FCC Rcd 22802, ¶ 13 (2000) ("*Comcast SportsNet Order on Review*") ("there may be some circumstances where moving programming from satellite to terrestrial delivery could be cognizable under Section 628(b) . . . if it precluded competitive MVPDs from providing satellite cable programming," but finding that, "the facts alleged are not sufficient to constitute such a violation here"); Memorandum Opinion and Order, *RCN Telecom Services of New York, Inc. v Cablevision Systems Corporation*, 16 FCC Rcd 12048, ¶ 15 (2001) (same); Memorandum Opinion and Order, *Everest Midwest Licensee, L.L.C. v. Kansas City Cable Partners and Metro Sports*, 18 FCC Rcd 26679, ¶ 10 (2003) ("Section 628(b) may not, *without more*, be invoked against conduct that is lawful under another provision of the Communications Act.") (emphasis added). Cablevision also cites (Answer at 26) the *EchoStar Order* for the proposition that it cannot be unfair for a cable operator to "exercis[e] competitive choices that Congress deemed

even setting aside whether this precedent remains controlling in light of the *MDU Order* – AT&T does not allege the existence of an affirmative duty to license all terrestrial programming by compulsion of Section 628(b); rather, AT&T alleges such a duty exists where: Cablevision selectively and discriminatorily makes the HD format of RSN programming available to some MVPDs but not to others (conduct antitrust law condemns in certain instances as "exclusionary" or "anticompetitive"); the HD format is the high-demand format of unique and non-replicable programming that, as Cablevision affirmatively emphasizes elsewhere, the Commission has determined time and again is vital to competitive success (especially for new entrants);[18] and the denial of the HD format of this RSN programming has either the purpose or effect (or both) of hindering AT&T's ability to win and keep subscribers in Connecticut. *See* AT&T Compl. ¶¶ 83-88. *None* of the Commission precedent cited by Cablevision suggests that an outright refusal to deal is lawful in these circumstances.

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legitimate" under Section 628(c), but Cablevision omits the Commission's explanation that Section 628(b) "cannot . . . be converted into a tool that, *on a per se basis*, precludes cable operators from exercising competitive choices that Congress deemed legitimate." *EchoStar Order* ¶ 29 (emphasis added). As explained, AT&T is not arguing that a refusal to deal in the HD format of terrestrial programming is a *per se* violation of Section 628(b). Rather, a claim under Section 628(b) requires showing the challenged conduct is unfair and has the purpose or effect of hindering the provisioning of video service to subscribers. The same analysis renders Cablevision's reliance (Answer at 27) on *Dakota Telecom Inc. v. CBS Broadcasting. Inc.*, 14 FCC Rcd 10500 (1999), misplaced. *See id.* ¶ 21 ("'without more'" a practice permitted under the Communications Act is not a violation of Section 628(b)).

[18] Reply Brief for Petitioners, *Cablevision Systems Corporation v. FCC*, Nos. 07-1425, 07-1487 at 30 (Sept. 17, 2008) ("Cablevision Reply") (acknowledging that the Commission has recognized RSN programming to be "more attractive to MVPD subscribers than almost all other programming that is available on cable"); *see infra* p. 20.

2. *Cablevision Is Wrong That Antitrust Law and Economics Do Not Support the Conclusion That Cablevision's Selective Refusal to Deal Is Unfair*

Cablevision further argues that antitrust law and economics do not support a finding that a selective refusal to license a vital input can be "unfair" conduct within the meaning of Section 628(b). *See* Answer at 57-63. Cablevision's arguments are wide of the mark.

First, Cablevision argues that its "decision to license MSG HD and MSG+ HD to some, but not all, MVPD distributors is procompetitive" and not a "sign of anticompetitive exclusion." Answer at 58. But the Supreme Court explained in *Trinko* that "a refusal to cooperate with rivals can constitute anticompetitive conduct" where, among other things, a "defendant [is] already in the business or providing a service to certain customers" but "refuse[s] to provide the same service to certain other customers." 540 U.S. at 408-10. Imposing liability in such cases makes sense because such conduct – refusing to engage in what the marketplace confirms would otherwise be profitable transactions with particular rivals – "suggest[s] a willingness to forsake short-term profits to achieve an anticompetitive end." *Id.* at 409; *see* IIIB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 772d3, (3d ed. 2008) at 224 (noting the Court in *Trinko* "limited liability for refusal to deal to those situations where the defendant was already selling some particular product or service to others but refused to sell that same product or service to the plaintiff" and thus "the doctrine does not apply where the requested assets are not otherwise marketed or available to the public") (internal quotations marks omitted).[19]

[19] Cablevision's experts are therefore wrong to opine that, "[i]f exclusivity is not anticompetitive, *a fortiori* less selective distribution is also benign." Bulow & Owen at 15. As explained, under *Trinko*, the distinction between a selective refusal to deal and an absolute course of non-dealing is crucial. The former may in certain instances be anticompetitive; the latter may not. *See* IIIB Areeda & Hovenkamp ¶ 772d3, at 224 ("There is no duty to sell something that the firm is using only internally or to share some facility that the firm is using for its own internal production *but is not in the business of sharing with others*.") (emphasis added).

That is precisely the case here. Not only does Cablevision make the HD format of MSG and MSG Plus available to MVPDs with which it does not compete (e.g., Comcast and Time Warner Cable) it also makes the HD format available to some MVPDs with which it does compete (e.g., DirecTV and RCN). Indeed, as Cablevision's experts explain, that Cablevision does license the HD format to "DirecTV and RCN is strong evidence that there is no barrier here to efficient transactions." Bulow & Owen at 2. But that is the point: this is not a situation where requiring Cablevision to deal with AT&T would impose costs on Cablevision (equivalent to the costs of forcing telephone companies to create wholesale market access that would not otherwise exist, *see Trinko*, 540 U.S. at 410), or where Cablevision has some other efficiency justification for refusing to deal with potential customers. Instead, Madison Square Garden is a programming vendor that has "marketed" and otherwise made "available" its programming to customers in the marketplace, including customers (like AT&T) that compete directly with Cablevision in the provision of MVPD service. *Id.* It has simply refused to engage in these marketplace transactions with specific rivals that compete with Cablevision in the MVPD marketplace – specifically, those that Cablevision has acknowledged pose the greatest threat of real, head-to-head, price-constraining competition to Cablevision.[20] Such conduct – by a firm with a dominant market position – may be deemed anticompetitive and, it follows *a fortiori*, an "unfair method of competition" under Section 628.[21]

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[20] *See, e.g.*, Answer at 3 (characterizing AT&T as Cablevision's "most formidable rival in the Connecticut video market"); *see also* AT&T Compl. ¶ 29 (citing Commission precedent recognizing the "major benefits for consumers" from effective wireline video competition).

[21] AT&T is not required to establish a violation of Section 2 to establish a violation of Section 628(b); rather, antitrust precedent helps inform the meaning of "unfair method of competition" under Section 628. That standard encompasses a wider swath of conduct than Section 2. *See, e.g.*, FCC Cablevision Br. at 25 n.7 ("The Commission's analysis under the Communications Act is distinct from the analysis the Department of Justice would perform under the antitrust laws, and the decision to retain the statutory prohibition at issue [i.e., the

Furthermore, Cablevision has not only licensed the HD format of MSG and MSG Plus to other MVPDs (suggesting it is profitable to do so but for the desire to impair AT&T), but it has made clear there is *no price* at which Cablevision would sell such programming to AT&T. *See* Levine Decl. ¶ 12. Cablevision's refusal to deal thus reflects a willingness to forsake profits from licensing the HD format in pursuit of broader anticompetitive ends. An "unwillingness" to sell, "even if compensated at retail price," "reveal[s] a distinctly anticompetitive bent," *Trinko*, 540 U.S. at 409 (emphasis omitted), and it follows that the unwillingness of Cablevision to license to AT&T, at any price, evidences anticompetitive ends. *Compare id.* at 409 (suggesting a refusal to sell at a retail rate, as opposed to a refusal to sell at a cost-based rate, may "tell[] us [something] about dreams of monopoly").[22]

Second, Cablevision argues its refusal to deal with AT&T is "amply supported by an even more particularized efficiency justification: product differentiation." Answer at 59. But, as AT&T explained in its Complaint, *see* AT&T Compl. ¶¶ 74-77, and as it addresses further

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prohibition on exclusive contracts in Section 628(c)] in this case should not be viewed as a finding that the prohibited agreements would constitute antitrust violations.").

[22] Cablevision's claim that *Trinko* applies only when there has been a termination of a voluntary course of dealing misreads the opinion, as the Court's discussion of *Otter Tail* makes clear. *See Trinko*, 540 U.S. at 410 (explaining *Otter Tail* as a case where "the defendant was already in the business of providing a service to certain customers (power transmission over its network), and refused to provide the same service to certain other customers"); IIIB Areeda & Hovenkamp ¶ 772d3, at 224 ("the [*Trinko*] Court did not categorically restrict the realm of unlawful refusals to situations in which the defendant had voluntarily established and later repudiated a course of dealing with the plaintiff"). That is especially the case here because Cablevision's voluntary dealing with some customers (e.g., RCN and DirecTV) but not others (e.g., AT&T and Verizon) serves the same analytical function as a prior-voluntary-course-of-dealing requirement – namely, demonstrating that there are no barriers to efficient transactions and that such transactions are profitable (but for Cablevision's hope of competitive impairment). *See id.* ¶ 772e, at 231 ("In *Trinko* the Supreme Court emphasized that the defendant in that case had never entered into voluntary dealing, but interconnected with CLECs only under the compulsion of the Telecommunications Act. As a result, nothing could be inferred from a decision not to cooperate with a rival. Indeed, the things for which interconnection was required were inputs that Verizon had not been in the business of selling to *anyone*. They have been developed for strictly internal use.") (footnote omitted).

below, *see infra* pp. 26-30, that justification is not a defense of Cablevision's conduct here. In particular, Cablevision is free to differentiate itself from AT&T in myriad other ways (as Cablevision suggests AT&T does or should do in competing with cable companies such as Cablevision). But the Cable Act reflects Congress's policy judgment that incumbent, vertically integrated cable operators may not use their control over irreplaceable, must-have programming as a competitive weapon (or, in Cablevision's words, "a product differentiator") to thwart video competition. Simply put, Cablevision cannot, as a matter of law under Section 628(b), defend its selective refusal to deal on the ground that it will enable Cablevision to avoid competitive losses that would result if AT&T were able to compete with the HD format of MSG and MSG Plus in its programming lineup. *Cf. Otter Tail*, 410 U.S. at 380 ("[The Sherman] Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency. Otter Tail's theory collided with the Sherman Act as it sought to substitute for competition anticompetitive uses of its dominant economic power.").[23]

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[23] Cablevision's experts argue that there is no short-term profit sacrifice here that would signal an unlawful refusal to deal. *See* Bulow & Owen at 12 ("No evidence has been provided that Cablevision/MSG is sacrificing even short-term benefits."). Cablevision makes the same point. *See* Answer at 61 (purporting to distinguish *Otter Tail* because of "the absence of a profit sacrifice"). But there is no doubt that Cablevision/Madison Square Garden is sacrificing licensing and/or advertising or other revenues from refusing to license the HD format of MSG and MSG Plus to AT&T. And there is no doubt that the only reason Cablevision would insist that Madison Square Garden forgo these revenues is that it expects that its profits from impairing AT&T as a rival will outweigh the losses in licensing and advertising revenues. *See* Bulow & Owen at 12 (noting Cablevision "presumably believes" its selective refusal to deal "will attract additional subscribers"). Every defendant engaged in anticompetitive conduct believes that, on balance, its conduct will be profitable; where that profitability arises *only* from the competitive impairment of a rival, such conduct is unlawful under Section 628(b). *Cf.* IIIB Areeda & Hovenkamp ¶ 772d3, at 223 (unilateral refusal to deal may be unlawful under Section 2 where the refusal is "'irrational' in the sense that the defendant sacrificed an opportunity to make a profitable sale *only because of the adverse impact the refusal would have on a rival*") (emphasis added).

Third, Cablevision argues AT&T has not demonstrated "the type of anticompetitive impact that would support imposing a duty to deal under standard antitrust analysis." Answer at 61. To begin with, it bears emphasis that this proceeding arises under Section 628(b); although antitrust principles shed light on the "unfair methods of competition" proscribed by Section 628(b), AT&T does not need to prove that "standard antitrust analysis" would require imposing liability on Cablevision under Section 2 of the Sherman Act. *See supra* n. 21.

Furthermore, Cablevision's arguments that AT&T's "competitive vitality" is not threatened by the denial of the HD format of MSG and MSG Plus, and that AT&T could enter "the market by some alternative not requiring the sharing of the defendant's facilities," are wrong. Answer at 62 & n.239 (internal quotations omitted). As explained in the next Section, AT&T's lack of access to the HD format of MSG and MSG Plus significantly hinders AT&T's ability to offer a competitive alternative to Cablevision for a large, and growing, segment of video subscribers who demand must-have RSN programming in the HD format. *See infra* pp. 19-25.

Finally, Cablevision maintains that AT&T's argument regarding two-level entry is a "red herring." Answer at 62. That assertion is difficult to fathom. AT&T is a new entrant attempting to gain a competitive foothold in the MVPD marketplace; Cablevision, as a vertically integrated cable operator that acquired RSN programming assets (and, indeed, the exclusive right to live broadcast of the teams carried on those RSNs, as well as outright ownership of some of those teams) at a time when it held *de facto* exclusive control over the MVPD marketplace, is seeking to force AT&T to enter the video programming marketplace if it wishes to be a successful competitor in the MVPD marketplace. *See* AT&T Compl. ¶ 73 & n.52. Under long-established principles, forcing AT&T to enter *two* markets (if not *three*, including the sports franchise

market) in order to compete in *one* is anticompetitive because it raises entry barriers and gives Cablevision a more durable dominant market position in the MVPD marketplace. *See, e.g.*, *Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 23-24 (1st Cir. 1990).

3. Cablevision Is Wrong That AT&T Has Not Demonstrated That Cablevision's Conduct Has the Effect of Impeding AT&T's Provisioning of Video Service

Cablevision also contends that its refusal to license the HD format of MSG and MSG Plus imposes no competitive harm on AT&T and thus cannot violate Section 628(b). *See* Answer at 42-57. Cablevision's arguments on this score are unavailing.

First, Cablevision's Answer and Cablevision's expert report regarding competitive harm ignore the statutory standard. For example, whereas Cablevision discusses whether AT&T's "competitive survival" depends on access to the HD formats of MSG and MSG Plus, Answer at 44; *see id.* at 43, Section 628(b) requires a different showing – namely, that the "purpose *or* effect" of conduct "is to hinder significantly or to prevent" an MVPD "from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." 47 U.S.C. § 548(b) (emphasis added).[24] AT&T's Complaint readily satisfies that standard. *See* AT&T Compl. ¶¶ 55-63. With regard to that universe of viewers who consider the HD format of MSG and MSG Plus the must-have format of must-have RSN programming, Cablevision's conduct "hinder[s]" or "prevent[s]" AT&T from providing service. Moreover, Cablevision openly admits that its "purpose" in denying access to that programming is to gain a significant competitive advantage over AT&T in Connecticut. From a statutory perspective, that is the end

[24] Indeed, in adopting rules implementing Section 628(b), the Commission explained that a complainant would need to "show that its ability to distribute programming to customers has been hampered in some fashion." *First Report and Order* ¶ 41. Cablevision's experts do not cite, much less discuss, the standard under Section 628(b).

of matter. The pages of its brief Cablevision devotes to showing that AT&T is investing in and has met with *some* success in Connecticut are thus irrelevant. *See* Answer at 52-57.[25]

Second, the Commission has long recognized that access to RSNs is vital to effective and full competition. A line of Commission precedent establishes that RSN programming is unique because it is both non-replicable and must-have, as Cablevision admits. *See id.* at 43 (acknowledging that findings of the competitive importance of RSNs are "commonplace in program access complaints and proceedings"). Indeed, in recent briefing before the D.C. Circuit, Cablevision *itself* stressed this very point. It asserted that "[t]he FCC has recognized in many settings that RSN programming is more attractive to MVPD subscribers *than almost all other programming that is available on cable*." Cablevision Reply at 30 (emphasis added).[26]

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[25] That is particularly the case given the Commission's prior holding that the competitive harm standard under Section 628(b) is relative, not absolute. *See First Report and Order* ¶ 41 n.26 ("We note that our analysis of the hindrance in the context of an alleged unfair practice will focus on whether the purpose or effect of the practice was to hinder or harm the complainant *relative* to its competitors.") (emphasis added). AT&T's *absolute* level of competitive success in Connecticut says little about whether, "relative" to Cablevision, AT&T has been hindered in its ability to compete effectively and fairly by the denial of a vital programming input.

[26] The statement of three FTC Commissioners in connection with the Adelphia transaction does not aid Cablevision's cause. *See* Answer at 43-44 & n.154 (citing Statement of Chairman Majoras, Commissioner Kovacic, and Commissioner Rosch Concerning the Closing of the Investigation Into Transactions Involving Comcast, Time Warner Cable, and Adelphia Communications, File No. 051-0151 (Jan. 31, 2006) ("FTC Commissioner Statement"), *available at* http://www.ftc.gov/os/closings/ftc/0510151twadelphiamajoras_kovacic_rosch.pdf). The FTC was assessing whether the transaction would "violate the antitrust laws," FTC Commissioner Statement at 2, and the FTC's assessment was preliminary, noting it would be "vigilant regarding the conduct of Comcast and TWC on a going forward basis" to determine if either company "is engaging in conduct that harms competition to the detriment of consumers," *id.* at 3. Applying standards under the *Communications Act* to that exact same transaction, this Commission concluded that RSNs are must-have programming and that the transaction would increase the risk of anticompetitive conduct with respect to RSNs. *See* Memorandum Opinion and Order, *Application for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation to Time Warner Cable Inc.*, 21 FCC Rcd 8203, ¶¶ 123, 189-90 (2006) ("*Adelphia Order*").

In challenging in this case the same precedent that it touted in that one, Cablevision argues that "ratings for MSG HD and MSG+ HD" show that they cannot be must-have programming. Answer at 45. This argument fails for at least three reasons. First, Cablevision did not submit any ratings evidence with its Answer. As a procedural and substantive matter, its conclusory and unsubstantiated ratings comparisons should be rejected.[27] Second, a ratings comparison between standard definition channels and the HD channel is likely meaningless. If the ratings are measured as a ratio to television households, for example, a comparison of HD and standard definition channels would be comparing apples and oranges. All televisions are capable of receiving standard definition channels, but it takes an HDTV to view HD channels. Lower ratings for HD channels as compared to standard definition channels would be expected, as there are far fewer potential viewers who could watch an HD channel. *See* Reply Decl.[28] ¶ 10. Third, ratings are but a single factor in the mix of factors that affect the importance of a channel to an MVPD: the uniqueness of the programming and intensity of viewer interest (both factors that make RSNs must-have programming) are crucial. *See id.* ¶ 12. Indeed, Cablevision does not dispute that – because MSG and MSG Plus carry more than 300 live professional sporting events, and owing to Connecticut's proximity to New York City – a significant number of consumers in AT&T's serving area in Connecticut demand MSG and MSG Plus in the HD format. *See* AT&T Compl. ¶ 55.

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[27] *See* 47 C.F.R. § 76.1003(e)(1) ("To the extent that a cable operator, satellite cable programming vendor or satellite broadcast programming vendor expressly references and relies upon a document or documents in asserting a defense or responding to a material allegation, such document or documents shall be included as part of the answer.").

[28] Joint Reply Declaration in Support of Program Access and Section 628(b) Complaint, *AT&T Services, Inc. v. Madison Square Garden, L.P.*, File No. CSR-8196-P (Oct. 2, 2009) ("Reply Decl.") (attached as Ex. 1).

Third, Cablevision's refusal to license the HD formats of MSG and MSG Plus is itself compelling, objective evidence that Cablevision understands its conduct is impairing AT&T's ability to compete. *See* AT&T Compl. ¶ 62. Programming networks, like MSG and MSG Plus, generate revenue from license fees and advertising, each of which increases with distribution on more MVPDs. It makes sense for Defendants to refuse to deal with AT&T *only* because they are willing to sacrifice such programming revenues to protect MVPD revenues, preventing Cablevision subscribers from defecting to AT&T or by enabling Cablevision to take subscribers from AT&T. Put differently, Cablevision's refusal to deal with AT&T is unmistakable evidence Cablevision believes its strategy is impairing AT&T's ability to win and keep subscribers. Indeed, Cablevision's experts concede this point: "There is no doubt that AT&T would be better off . . . if MSG HD and MSG+ HD were available to it." Bulow & Owen at 3. They explain that, by refusing to deal with AT&T, "Cablevision hopes to gain a marketing advantage amongst a group of local sports fans who will regard the availability of MSG HD and MSG+ HD as a selling point in Cablevision's favor relative to AT&T." *Id.* at 7. Just so, and Cablevision's expenditures on advertising – emphasizing its carriage of MSG and MSG Plus in the HD format, as compared to AT&T's lack of carriage – is further evidence of this key point. *See* AT&T Compl. ¶¶ 65-66.

Fourth, as AT&T has explained, studies validate what Cablevision's conduct evidences: the HD format is the must-have format for RSN programming, which is itself essential, must-have programming. *See* AT&T Compl. ¶¶ 58-60.

Cablevision's scattershot criticisms of these studies do nothing to call into question the conclusion that the HD format is both particularly important to sports fans (the same fans who would consider RSNs important), as it elsewhere concedes, and that demand for HD is

skyrocketing. Cablevision argues, for example, that "sports fans that own HDTVs could be expected to be slightly less than 26% of the total population." Answer at 46. But, standing on its own, that number is substantial: Congress made a judgment that vertically integrated entities should not be able to use unfair methods of competition that have the purpose or effect of hindering a competing provider's ability to provide video programming. Even assuming that one in four subscribers would consider HD RSN programming important, Cablevision's conduct is an attempt to lockup 25 percent of potential subscribers and to keep them from switching to AT&T. This easily implicates Section 628(b): the Commission declared MDU exclusivity provisions unlawful in the *MDU Order* in the face of evidence that "[a]pproximately 30 percent of Americans live in MDUs," *MDU Order* ¶ 1, and, of course, not all MDUs had exclusive contracts.

Cablevision also maintains that evidence that 45 percent of HDTV sports fans would consider switching to another source if superior to their current package is "unsurprising and proves little." Answer at 48. But Cablevision's quibbles with the wording of the survey prove nothing: the upshot is that approximately half of HDTV sports fans – the very universe of subscribers likely to care intensely about RSN carriage – would consider switching to a better array of HD sports programming. That statistic underscores the competitive importance of the HD format of RSN programming to MVPDs and answers Cablevision's repeated assertion – backed by *no* evidence – that the standard definition format of sports programming is sufficient to compete. *See id.* at 44-45.[29] As AT&T has explained, the growing demand for the HD format

[29] Indeed, if standard definition and the HD formats of RSN programming are comparable from a competitive perspective, it is difficult to understand: (a) Cablevision's decision to invest substantially in the *HD* format of RSN programming, *see* Answer at 2 (describing "ground-breaking investment" in HD sports programming), and (b) Cablevision's choice of the HD format of RSN programming alone as the format it will not license to AT&T.

– especially among sports fans – strengthens the understanding that the HD format is a must-have format for RSN programming. *See* AT&T Compl. ¶¶ 58-60.

In addition, survey evidence submitted in a similar proceeding between Verizon and Cablevision supports the conclusion that the HD formats of MSG and MSG Plus are must-have programming.[30] That evidence shows that subscribers in and around New York City and New York state assign a high value to MSG and MSG Plus.[31] And, given the proximity of Connecticut to New York City, and given that part of the areas of Connecticut where AT&T provides service is in an overlapping designated market area ("DMA") with New York City, that survey evidence also is probative of the must-have status of the HD format of MSG and MSG Plus in Connecticut.

Fifth, as AT&T has established, AT&T's penetration rate for its HD programming in Connecticut lags behind that of other states where AT&T provides U-verse TV service. *See* AT&T Compl. ¶ 61. This difference in penetration rates is explained by AT&T's inability to offer MSG and MSG Plus in the HD format. *See* Joint Decl. ¶¶ 18, 51; Reply Decl. ¶¶ 5-6.

Cablevision responds that data on HD service "do not offer any insight into whether lack of MSG HD and MSG+ HD has caused AT&T to lose any video subscribers." Answer at 49. Cablevision points to evidence that, it says, suggests that "the overall U-verse penetration rate among homes passed in Connecticut . . . is *actually* higher in Connecticut for AT&T than comparable national average figures." *Id.* at 50. But, as explained in full in the attached Reply Declaration, Cablevision's speculation regarding alternative factors that it thinks may explain the

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[30] *See* Global Marketing Researching Services Survey of Paid Television Subscribers in NY and Buffalo Designated Market Areas (Aug. 7, 2009) (attached to Declaration of Chris Stella, *Verizon Tel. Cos. v. Madison Square Garden, L.P.*, No. CSR-8185-P (FCC Aug. 13, 2009)).

[31] *See id.* at 6.

difference in HD penetration is not plausible. *See* Reply Decl. ¶ 6. Furthermore, any success of AT&T with respect to overall penetration in Connecticut does not remotely suggest that Cablevision's conduct has not hindered or prevented AT&T from winning or keeping subscribers. The key point is that there is a significant number of sports fans for whom RSN programming is a priority, who are a driving force behind the demand for HD content, and for whom the must-have format of must-have RSN programming is critical. *See id.*

4. Cablevision's Claim That Its Refusal to Deal Is Not Motivated by a Purpose of Impeding AT&T's Ability to Compete Is Unpersuasive

Cablevision argues that AT&T's "purpose" claim – i.e., that Cablevision's refusal to deal is motivated by a purpose of impairing AT&T's ability to compete – is "wholly without support." Answer at 33. That is so, Cablevision asserts, because "[c]ost, technical, and other legitimate business considerations drove the decision to use terrestrial delivery MSG HD and MSG+ HD." *Id.* at 6; *see id.* at 34. That is a *non sequitur*. The relevant inquiry with respect to Count I is whether Cablevision's refusal to license the HD format to AT&T has the "purpose" of "hinder[ing]" or "prevent[ing]" AT&T's ability to win or keep subscribers. That the HD format of MSG and MSG Plus is delivered terrestrially has nothing to do with whether Cablevision's refusal to license that format to AT&T is motivated by a desire to impair AT&T's ability to compete. Again, Cablevision's experts acknowledge that the only reason for Cablevision to engage in selective licensing is "to gain a marketing advantage amongst a group of local sports fans who will regard the availability of MSG HD and MSG+ HD as a selling point in Cablevision's favor relative to AT&T." Bulow & Owen at 7. As far as Section 628(b) is concerned, that should be the end of the matter.

In an effort to obscure the fact that the "purpose" of its selective licensing strategy is to "hinder[]" and "prevent[]" AT&T from winning subscribers – which is all that Section 628(b)

requires – Cablevision goes to great lengths defending the theoretical procompetitive benefits of exclusivity and product differentiation. *See* Answer at 36-41. Although exclusivity is often procompetitive, this is no defense of Cablevision's conduct here.

As a threshold matter, there is an important difference between exclusivity in the context of vertical integration, on the one hand, and arms' length exclusive arrangements between unaffiliated firms, on the other. An unaffiliated programmer – especially an RSN – would have every incentive to strike deals with as many distributors as possible: all networks' revenue depends on license fees and advertising revenues and RSNs in particular need broad distribution to cover the high costs of sports programming rights. An MVPD's exclusive deal with an *unaffiliated* network would signal some procompetitive benefit, otherwise the network would have no incentive to enter it.[32] As the Commission has explained, "[a] *vertically integrated* programmer, however, is in a different boat; any loss in revenue caused by an exclusive contract may be compensated by the increased revenue its cable affiliate would earn from new subscribers, higher affiliation fees . . ., and higher cable rates charged to all subscribers." FCC Cablevision Br. at 41 (emphasis added). In other words, because of vertical integration, Madison Square Garden is willing to sacrifice revenues simply to benefit Cablevision's distribution business. There is nothing procompetitive about that.

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[32] This is consistent with the principle that an unaffiliated upstream supplier of an input or a manufacturer has an interest in widespread distribution of its input or product. *See* XI Hovenkamp, *Antitrust Law* ¶ 1803a, at 100 (2d ed. 2005) ("principal concern" with output contracts – in which a seller agrees to sell products only to a particular buyer – "is monopoly or other injury to competition in the buyer's market" but "a manufacturer or supplier ordinarily does not profit from monopoly in its downstream market" and, "[f]or that reason, the great majority of output contracts are at least presumptively procompetitive"); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 56 (1977) ("Economists also have argued that manufacturers have an economic interest in maintaining as much intraband competition as is consistent with the efficient distribution of their products.").

Furthermore, this is not a context where exclusivity can be expected to spur beneficial innovation in the programming marketplace, for the simple reason that MSG and MSG Plus cannot be replicated. Cablevision not only has exclusive rights to games of the Knicks, Rangers, Islanders, and Devils, but it also owns the underlying Knicks and Rangers franchises. *See* Answer at 86, ¶ 23 ("Admit that MSG has exclusive rights to exhibit games of the professional sports teams named in this paragraph within a certain geographic region. Admit ownership of the New York Knicks and New York Rangers."). As the Commission recently told the D.C. Circuit, "[n]o matter its size or its sunk costs, a competitive MVPD cannot readily replicate the content of a cable-owned RSN . . . that has earned a substantial level, even decades-worth, of viewer familiarity and good will." FCC Cablevision Br. at 39; *see also, e.g.*, *News Corp. Order*[33] ¶ 133 ("there are no readily acceptable close substitutes" for RSN programming). That is true in general, and doubly true where the programmer owns the key underlying franchises and already has proven that it will not agree to license the rights to their games.

What is more, even if AT&T could undertake the costs of developing its own RSN programming (while at the same time undertaking the enormous costs of entering the video distribution marketplace) – and even if AT&T could at the same time somehow acquire sports programming rights that have been locked up by Cablevision – Cablevision's status as the gatekeeper of the largest video distribution systems in areas where AT&T competes with Cablevision would render this strategy economically precarious. Just as vertical integration gives *programmers* the incentives to favor the interests of affiliated distributors, Congress and this Commission have repeatedly found that such integration gives *cable operators* (e.g.,

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[33] Memorandum Opinion and Order, *General Motors Corp., and Hughes Elect. Corp., Transferors, and the News Corp. Ltd., Transferee, for Authority to Transfer Control*, 19 FCC Rcd 473 (2004) ("*News Corp. Order*").

Cablevision) the incentive to deny carriage to unaffiliated RSNs to protect the economic interests of affiliated RSNs (e.g., MSG and MSG Plus).[34] As explained, Cablevision has already acknowledged that it considers the HD format of RSN programming as competitively significant, so it can be fairly inferred that Cablevision would refuse to carry a new AT&T RSN that would compete with MSG and MSG Plus. And, without carriage on Cablevision's cable systems, an AT&T RSN would have no hope of achieving economic viability.[35] For this reason as well, Cablevision's refusal to license the HD format of MSG and MSG Plus to AT&T cannot be expected to spur procompetitive innovation in RSN programming by AT&T.

It is no answer to say that AT&T could invest in other types of programming or other types of innovation. Cablevision's experts argue that "AT&T's strategic alternatives are not limited to those that would attract the exact same set of subscribers it would have if it offered MSG HD and MSG+ HD at the price it would then charge." Bulow & Owen at 4. But Congress made a judgment that, in the context of vertically integrated cable companies, "product differentiation" – whatever its benefits in other contexts – cannot be based on withholding must-have programming.[36] As AT&T has explained, Section 628 reflects Congress's judgment that

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[34] *See, e.g.*, Order on Review, *TCR Sports Broadcasting Holding, L.L.P. v. Time Warner Cable Inc.*23 FCC Rcd 15783, ¶ 25 (2008) ("*MASN-TWC Order*") ("vertically-integrated MVPDs have a strong incentive" to discriminate to favor the interests of "affiliated RSNs"); S. Rep. No. 102-92, at 25, *reprinted in* 1992 U.S.C.C.A.N. 1133, 1158 (vertical integration "gives cable operators the incentive and ability to favor their affiliated programming services" by, among other things, unreasonably "refus[ing] to carry other programmers"); Third Report and Order and Third Further Notice of Proposed Rule Making, *Carriage of Digital Television Broadcast Signals*, 22 FCC Rcd 21064, ¶¶ 49, 50 (2007); *2007 Order* ¶ 5.

[35] *See MASN-TWC Order* ¶ 31 (RSN "programming is among the most expensive programming in the industry, and RSNs must recover the costs of such programming through per-subscriber fees and the sale of advertising"; "[b]ecause RSNs, unlike national networks, are regional in nature, they require access to the maximum number of subscribers within their footprints . . . in order to compete effectively").

[36] As the Commission has explained, "[t]he program access requirements of Section 628 have at their heart the objective of releasing programming to the existing or potential competitors

programming cannot be used as a competitive weapon against competing distributors. *See* AT&T Compl. ¶ 64. AT&T's Complaint accordingly does not seek to undermine procompetitive product differentiation. Just the opposite: AT&T wants to force Cablevision to compete – and to differentiate its product (if it can) – on terms that are fair and consistent with the competitive framework established by Congress. Just as Cablevision suggests AT&T can differentiate itself through a variety of procompetitive means, Cablevision also is free to differentiate itself from AT&T. It simply may not achieve such differentiation through withholding the must-have format of irreplaceable, must-have programming that Cablevision does selectively make available to other rivals.

For these reasons, Cablevision's analogy between its selective refusal to deal and exclusive arrangements in the wireless industry is tortured. *See* Answer at 36-37. Wireless handset manufacturers and wireless carriers are not vertically integrated; a manufacturer's decision to enter into an exclusive arrangement with a carrier is thus strong evidence of procompetitive benefits from such exclusivity. In addition, wireless handsets are subject to rapid technological change and innovation; unlike RSN programming – which is unique and non-replicable – wireless handset technology is changing constantly. Today's must-have handset will be tomorrow's outdated technology. In such an environment, exclusivity is not likely to have an anticompetitive effect. RSNs, however, have long been must-have programming and have a

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of traditional cable systems so that the public may benefit from the development of competitive distributors." *First Report and Order* ¶ 21; *see also* FCC Cablevision Br. at 31 ("Petitioners obviously 'disfavor' the obligations imposed by § 628, but Congress did not. It acted to prevent vertically integrated cable operators from engaging in one method of 'unfair . . . competition' by forbidding them from withholding critical programming necessary to the development of video competition."); *First Report and Order* ¶ 63 ("In the unique situation presented [under Section 628] . . . it is clear that exclusivity is not favored. Congress has clearly placed a higher value on new competitive entry than on the continuation of exclusive distribution practices that impede this entry.").

durability that will not be overtaken by technological change or innovation. *See* AT&T Compl. ¶ 75. Finally, as AT&T has explained and this Commission has found, competition is robust in the wireless marketplace,[37] whereas comparable levels of competition are simply not present in the MVPD marketplace. *See infra* pp. 30-31.[38]

5. Cablevision's Argument That the Commission Should Decline to Enforce Section 628(b) Because of Purported Competition is Wrong on the Law and the Facts

Finally, Cablevision suggests that, even if its conduct does violate Section 628(b) – or apparently any other provision of Section 628 – the Commission should decline to enforce the statute. That is so, Cablevision asserts, because there is "robust competition for video services in the areas of Connecticut where AT&T competes with Cablevision." Answer at 80; *see id.* 80-82. This argument misapprehends the law and it is wrong on the facts.

First, Cablevision does not (because it cannot) cite any authority for the proposition that the Commission should abstain from enforcing Section 628(b), Section 628(c), or the program access rules – if the statutory or regulatory elements are satisfied – because of "competition." Congress did not impose a statutory exception for areas where competition has taken hold, and the Commission is not free to engraft atextual limits on the Cable Act.

Second, Cablevision substantially overstates the degree of competition. As the Commission recently told the D.C. Circuit, "cable operators continue to dominate the MVPD

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[37] *See* AT&T Compl. ¶ 77 & n.54; Thirteenth Report, *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 24 FCC Rcd 6185, ¶ 2 (2009).

[38] Cablevision also argues that AT&T's Complaint is an impermissible attempt to evade a pending rulemaking involving the application of Section 628(c) to terrestrial programming. *See* Answer at 21-23. AT&T has already explained why that is not the case. *See* AT&T Compl. at ii n.2. In particular, a ruling in AT&T's favor here would not affect the so-called terrestrial loophole. AT&T seeks only a narrow ruling that, on the facts of this case, Cablevision's refusal to license the HD format of MSG and MSG plus is proscribed by Section 628*(b)*.

landscape. More than two-thirds of MVPD customers nationwide still subscribe to cable service, and in many parts of the country that percentage is even higher." FCC Cablevision Br. at 25.[39] Cablevision points to competition from DirecTV and DISH, but, as AT&T explained, empirical evidence – that Cablevision ignores – establishes that wireline competition is critical to discipline incumbent cable operators. *See* AT&T Compl. ¶ 6 n.8. Further, the fact that the Commission has found "effective competition" in communities in Connecticut that AT&T serves owes to the so-called "LEC trigger"; the statute frees cable incumbents from rate regulation when a local exchange carrier (such as AT&T) has a competitive presence. It is not a measure of whether meaningful competition has taken hold. *See* 47 U.S.C. § 543(*l*)(1)(D). Indeed, as the Commission explained in a related context, if "nascent competition from a telephone company were . . . a basis for doing away with the prohibition on exclusive access to cable-owned programming, then the benefits to consumers from such new entry would likely be 'severely hindered', if not eliminated altogether." FCC Cablevision Br. at 58.[40] The same is true here.

III. CABLEVISION'S REFUSAL TO DEAL VIOLATES THE CABLE ACT'S AND THE COMMISSION'S PROGRAM ACCESS RULES

A. Cablevision's Unreasonable Refusal to License the HD Format of MSG and MSG Plus to AT&T Violates Section 628(c)

Cablevision concedes – as it must – that "unreasonable refusals to sell" are "a form of non-price discrimination" "actionable under Section 628(c)." Answer at 63. In Count II of the

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[39] *See* FCC Cablevision Br. at 17 (citing record evidence "that cable operators continue to dominate MVPD subscribership"); *id.* at 20 (citing evidence that "the cable industry controls 67 percent of all MVPD subscribers – a percentage that is even higher in many DMAs – and that consolidation in the cable industry has increased significantly since 2002").

[40] The D.C. Circuit's recognition in *Comcast Corp. v. FCC*, No. 08-1114, -- F.3d --, 2009 WL 2633763, at *5 (D.C. Cir. Aug. 28, 2009), that, with DBS now serving 33% of subscribers, the competitive landscape differs from 1992 does not alter this analysis. As AT&T has explained, and Cablevision has not addressed, this Commission has continued to find that DBS competition alone is insufficient to provide competitive discipline. *See* AT&T Compl. ¶ 6 n.8.

Complaint, AT&T has established that Cablevision unreasonably has refused to sell the HD format of MSG and MSG Plus to AT&T. Although Section 628(c) applies only to satellite cable programming, moreover, the HD *format* of MSG and MSG Plus is "satellite cable programming." *See* AT&T Compl. ¶ 96. That is because the underlying programming content that makes up MSG and MSG Plus is delivered via satellite, albeit in the standard definition format. That the HD format is transmitted terrestrially does change the fact that the programming itself is programming that is delivered via satellite. *See id.*

B. Cablevision's Contrary Arguments Are Unavailing

Cablevision does not dispute that it would have a duty not to refuse to deal with AT&T if the HD format of MSG and MSG Plus is satellite cable programming. Nor does Cablevision point to any legitimate, non-discriminatory basis for doing so. Cablevision instead argues that "only satellite cable programming is subject to [Section 628(c)]" and, it contends, the HD formats of MSG and MSG Plus are not "'satellite cable programming.'" Answer at 63, 64. Although Cablevision is correct that Section 628(c) applies only to satellite cable programming, it is wrong that MSG and MSG Plus are not satellite cable programming.

No one disputes that the standard definition *format* of MSG and MSG Plus *programming* is delivered via satellite. Because the trigger for the application of Section 628(c) is programming and not programming *formats*, it is also the case that the HD format of MSG and MSG Plus is programming that is delivered via satellite. Therefore, MSG and MSG Plus "programming" – regardless of format – is "satellite cable programming."[41]

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[41] By analogy, if a federal environmental statute mandated that "all rivers that flow through Arkansas" must comply with certain regulations, it would be no answer to say that compliance is unnecessary with respect to a leg of that "river" in Missouri if that "river" *also* "flow[s] through Arkansas." Similarly, Section 628(c) applies certain duties to "programming" delivered via satellite. Because the "programming" of MSG and MSG Plus is equivalent regardless whether it is transmitted by satellite or terrestrially and because that programming is

Cablevision insists that the *EchoStar Order* refutes this theory. *See* Answer at 65. Not so. There, the Cable Services Bureau rejected the proposition that SportsNet – an RSN delivered terrestrially in Philadelphia – was actually "satellite cable programming." *Echostar Order* ¶ 21. The Commission noted EchoStar had "ma[de] little effort to demonstrate that SportsNet is in fact 'satellite cable programming,'" and instead had argued that "if the programming were satellite delivered, it would be subject to the program access provisions of the Communications Act." *Id.* On the record before it, the Commission refused to hold programming that had previously been satellite-delivered or that was somehow equivalent to satellite programming was covered. *See id.* The order simply does not speak to the issue here: whether a format of programming delivered terrestrially – when the underlying programming, but not the particular format of programming, is delivered via satellite – is satellite cable programming under Section 628(c).[42]

As AT&T has explained, even were there ambiguity with respect to application of Section 628(c) to programming transmitted in two formats – one via satellite and another via terrestrial means – AT&T's interpretation best advances the underlying policy objectives of the Communications Act. *See* AT&T Compl. ¶¶ 97-98. Cablevision argues these policy

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delivered via satellite, it is no answer to say the HD format of MSG and MSG Plus "programming" is not regulated by Section 628(c) simply because the format is delivered terrestrially.

[42] Cablevision's argument that "the Commission has consistently adhered to the plain language of Section 628 and focused on the means by which that particular programming is transmitted to cable operators and other MVPDs" accordingly may be true, but is irrelevant. Answer at 65. The *programming* that constitutes MSG and MSG Plus is "transmitted to cable operators and other MVPDs" via satellite, even if not all *formats* of the programming are. Cablevision is therefore wrong to say "[s]ubjecting a terrestrial HD service to program access requirements simply because an affiliated SD programming service was satellite-delivered would be tantamount to a determination that a programmer covered by Section 628 has an affirmative and continuing legal duty to distribute its programming in a manner that ensures its continuing coverage under the program access rules." *Id.* at 65-66. Holding that "satellite cable programming" includes all formats of programming when the programming is satellite delivered would not dramatically expand Section 628(c); it would be a narrow rule that applies only when separate formats of the same programming are transmitted via separate delivery methods.

considerations cannot justify "[e]xpanding the program access requirements beyond the limits expressly imposed by Congress," Answer at 67; *see id.* at 68 (suggesting the "general prescriptions of Section 706" cannot "trump Congress' specific limitation of Section 628 to satellite cable programming"), but that begs the question – namely, whether the HD format of MSG and MSG Plus *is* "satellite cable programming." "Programming," as AT&T has explained, is naturally read to encompass various formats of programming – a conclusion consistent with the view that Congress could not have intended to permit vertically integrated programmers to evade their program access duties simply by delivering the most valuable *format* of programming via terrestrial means. At the least, the Cable Act does not unambiguously foreclose that construction. The Commission is accordingly justified in considering policy goals in construing any ambiguity in Section 628(c) and in doing so, by definition, the Commission is not transgressing "limits expressly imposed by Congress."[43]

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[43] Cablevision argues there is no evidence that withholding must-have programming from AT&T in Connecticut has "act[ed] as a barrier to AT&T's investment in broadband," but it ignores a sworn declaration from AT&T that increased competitiveness in video translates into increased incentives for broadband investment. *See* Joint Decl. ¶ 55 ("What is more, carriage of MSG and MSG Plus in the HD format would enable AT&T to offer video consumers in Connecticut a stronger competitive alternative to the incumbent cable operators' services. The resulting increase in AT&T's video service revenues would make the Project Lightspeed broadband initiative more attractive in Connecticut for investment and deployment, and, thereby, promote broadband deployment in that state."). Furthermore, this Commission has recognized the linkages between reducing barriers to competitive success in video and enhanced broadband deployment and made express findings on this point. *See MDU Order* ¶ 46; Report and Order and Further Notice of Proposed Rulemaking, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 FCC Rcd 5101, ¶ 13 (2007) ("Revenues from cable services are, in fact, a driver for broadband deployment."), *petitions for review denied, Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008), *cert. denied*, 129 S. Ct. 2821 (2009); *id.* ¶ 62 ("The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated.").

Cablevision also argues that, in other contexts, the Commission has not considered "networks transmitted in multiple formats to be the same programming." Answer at 66. The authority Cablevision cites is irrelevant. The *2009 Video Competition Report* simply reflects that the HD and standard definition format of programming may be provisioned over separate *channels*. That has no bearing on whether the HD and standard formats are the same *programming* for purposes of Section 628(c). Similarly, a decision to allow broadcasters to choose must carry and/or retransmission consent with respect to digital and analog signals is inapposite: here, again, the Commission was not interpreting *programming* under Section 628(c); it was interpreting rules that apply to *signals*. *See* First Report and Order and Further Notice of Proposed Rulemaking, *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, ¶ 27 (2001) ("*First Digital Signals Order*"); *see* 47 U.S.C. § 325(b)(1) ("[n]o cable system or other multichannel video programming distributor shall retransmit the *signal* of a broadcasting station, or any part thereof" except under the circumstances outlined in the statute) (emphasis added); *id.* § 534(a) ("Each cable operator shall carry, on the cable system of that operator, the *signals* of local commercial television stations and qualified low power stations as provided by this section.") (emphasis added). In any event, the Commission's reading was driven by a policy concern with facilitating the digital transition;[44] here, as explained, policy concerns support AT&T's proposed interpretation of "programming."

In addition, Cablevision asserts the difference between the HD and standard definition formats of MSG and MSG Plus is not "a matter of technical format." Answer at 66. Cablevision claims that "content . . . can differ" between the formats, but it offers no explanation for how that

[44] *See First Digital Signals Order* ¶ 27.

is so. *Id.*[45] The Answer cites only paragraph 13 of the Levine Declaration, but the declaration is equally elliptical and, indeed, suggests only that content *may* one day differ, not that it does. *See* Levine Decl. ¶ 13 ("the underlying content shown the terrestrially-delivered MSG HD and MSG+ HD services *will not* necessarily always be the same as that found on satellite-delivered SD MSG and MSG+ services") (emphasis added). Cablevision's assertion, moreover, is contradicted by its public statements that "HD is a format change, not a product," and that "[t]he content delivered in HD is the same as the transition from black and white to color."[46] If Cablevision means to suggest that not all content that is available in the standard definition format is available in the HD format,[47] that is irrelevant: it would still be the case that all of the must-have programming provided via the HD format of MSG and MSG Plus *is* programming also provided via satellite (albeit in the standard definition format).[48]

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[45] For this reason, that the HD and standard definition formats may have different formatting features – such as "resolution, depth, audio, and display" – and may be separately licensed or provided on separate channels is irrelevant. *Id.* at 66-67. The legal test is whether the "programming" content is provided via satellite: because the content is provided via satellite (albeit in the standard definition format), that programming is regulated by Section 628(c) (even in the HD format). *See* AT&T Compl. ¶ 96.

[46] Mike Farrell, *Maverick Plays and Wins by Its Own Rules*, Multichannel News (Sept. 23, 2007) (quoting Cablevision COO Tom Rutledge), *available at* http://www.multichannel.com/article/87682-Maverick_Plays_and_Wins_by_Its_Own_Rules.php.

[47] *See, e.g.*, Answer at 44 n.156.

[48] Cablevision's response that "AT&T's argument proves too much" – because, if the HD format "is the same" as the standard definition format, AT&T "is not being deprived of anything," *id.* at 67 – misses the point. The HD format of MSG and MSG Plus is "programming" that is satellite delivered; therefore, the HD format, like the standard definition format, is regulated by Section 628(c).

IV. CABLEVISION'S REFUSAL TO PROVIDE THE HD FORMAT OF MSG AND MSG PLUS TO AT&T CONSTITUTES DISCRIMINATION IN VIOLATION OF SECTION 628(c) AND THE COMMISSION'S IMPLEMENTING RULES

A. Cablevision is Discriminatorily Denying to AT&T the HD Format of Programming Available to Competing MVPDs

In Count V, AT&T has established that Cablevision is discriminating against AT&T in violation of the Cable Act and the Commission's implementing rules. *See* AT&T Compl. ¶¶ 107-111. Cablevision makes the HD format of MSG and MSG Plus available to other MVPDs. But it has refused to make this term and condition of program access available to AT&T. *See id.* ¶¶ 109-110. Because Cablevision lacks a legitimate, non-discriminatory justification for this difference in treatment, its conduct is unlawful.

B. Cablevision's Contrary Arguments Are Unavailing

Cablevision does not seriously dispute that, if the Commission's non-discrimination rules apply, it is in violation of those rules.[49] The arguments Cablevision does make are unpersuasive.

Cablevision's principal response is that the non-discrimination provision applies only to "satellite cable programming" and the HD formats of MSG and MSG Plus HD are not "satellite cable programming." Answer at 76-77. But this argument is addressed above: the HD format of MSG and MSG Plus is satellite cable programming. *See supra* pp. 32-36.

Cablevision also argues that AT&T's discrimination claim is "procedurally barred" because "AT&T's 10-day letter offered no notice or description of a claim of unlawful discrimination." Answer at 76. But AT&T's 10-day notice letter explained that Cablevision was in violation of "§ 628, and the Commission's rules implementing that section." AT&T Compl.

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[49] Cablevision does suggest its differential treatment is justified by its pursuit of a product differentiation strategy. *See* Answer at 79. But Cablevision makes no effort to show that any of the bases for allowing differential treatment of MVPDs are satisfied. *See* AT&T Compl. ¶ 111; 47 C.F.R. § 76.1002(b)(1)-(3).

Exh. 5, at 2. The prohibition against discrimination in the terms and conditions of program access is a core provision of Section 628, *see* 47 U.S.C. § 548(c)(2)(B), and the Commission's implementing rules, *see* 47 C.F.R. § 76.1002(b). By its plain terms, then, AT&T's letter put Cablevision on notice of a discrimination claim. *Accord* Fed. R. Civ. P. 8.

Cablevision's interpretation of the 10-day notice requirement should also be rejected because it would not serve any conceivable purpose. The purpose of the requirement is to "give the [programming] vendor an opportunity to resolve the dispute without involving the Commission." *First Report and Order* ¶ 124. In light of Cablevision's steadfast refusal to negotiate with AT&T regarding the HD formats of MSG and MSG Plus and Cablevision's refusal to settle similar claims by Verizon in a proceeding initiated before AT&T's 10-day notice letter, Cablevision cannot plausibly claim that any more specificity regarding a discrimination claim would have promoted negotiated resolution. Nor can Cablevision claim any prejudice. Cablevision had ample time to prepare given the extended period to file an answer as the parties negotiated a protective order and given that Verizon made similar allegations against Cablevision in a proceeding filed before AT&T's 10-day notice letter.[50]

[50] Cablevision's assertion the Complaint does not comply with 47 C.F.R. § 76.1003(c)(4) is incorrect. *See* Answer at 76-77 & n.311. AT&T's Joint Declaration (signed by officers of AT&T) alleges the differential treatment underlying the discrimination count: it is common practice to include HD rights in carriage agreements for the standard definition format, *see* Joint Decl. ¶ 33, and Cablevision does provide the HD format of MSG and MSG Plus to other MVPDs (but not to AT&T), *see id.* ¶¶ 41-42. And, given that Cablevision has *conceded* that it has adopted a "selective licensing strategy" – namely, providing the HD formats to some MVPDs but not to others (such as AT&T and Verizon), requiring further evidence "that a differential in price, terms or conditions exists," 47 C.F.R. § 76.1003(c)(4), would be pointless.

V. AT&T HAS STATED A *PRIMA FACIE* CASE OF UNLAWFUL AVOIDANCE

A. AT&T Has Alleged a *Prima Facie* Case With Respect to Count III

In Count III, AT&T has alleged that Cablevision's delivery of the HD format of MSG and MSG Plus terrestrially, while at the same time delivering the standard definition format of the programming via satellite, reflects at least in part Cablevision's interest in avoiding the HD format being regulated under Section 628(c) and the Commission's implementing rules. *See* AT&T Compl. ¶ 100. This Commission has recognized that terrestrial delivery, "if it preclude[s] competitive MVPDs from providing satellite cable programming," may violate Section 628(b) as an unlawful evasion of Section 628(c) obligations. *Comcast SportsNet Order on Review* ¶ 13. Here, for the reasons explained above, the denial of the HD format of MSG and MSG Plus to AT&T has the purpose or effect of hindering AT&T from providing video service to subscribers and thus runs afoul of Section 628(b). *See supra* pp. 2-6.

B. Cablevision's Contrary Arguments Are Unavailing

Cablevision insists that Count III is a "'throw-away'" argument because, Cablevision argues, AT&T pleads only on information and belief and does not "provide a factual predicate for its claims sufficient to render those claims plausible." Answer at 69. Cablevision also argues that it had and still has a variety of technological and economic reasons for delivering the HD format of MSG and MSG Plus terrestrially. *See id.* at 70-71.

But the combination of allegations and evidence in the Complaint and Cablevision's own Answer establish that AT&T has stated a *prima facie* case of unlawful evasion. Cablevision's Answer emphatically demonstrates that Cablevision places a high-value on (selective) exclusivity with respect to the HD format of its RSNs, *see, e.g., id.* at 34-41, and, that it disdains any regulatory duty that would require Cablevision to share the HD format with other MVPDs,

see id. at 80-82. In the face of these positions, AT&T's allegation that a desire to shield this asset from sharing obligations under Section 628(c) was or is a substantial factor in Cablevision's decision to deliver this format terrestrially is not only plausible, it is the most likely inference. Discovery will, of course, be necessary conclusively to resolve this issue.

Cablevision also argues that it is "absurd" to claim its decision to deliver the HD format terrestrially was influenced by a desire to withhold the HD format from competitors given that, according to Cablevision, no competitors wanted it when the HD format was developed. *Id.* at 70. But this ignores that, on Cablevision's own telling, it made investments in HD programming several years *after* Congress enacted the 1992 Cable Act. *See id.* at 9 n.8 (noting the launch of MSG and MSG Plus in the late 1990s). It strains credulity to suggest that Cablevision – a sophisticated economic actor not reticent about expressing its dislike of program access duties – did not consider the implications of terrestrial and satellite delivery with respect to program access obligations under the 1992 Cable Act in the event that its investment in the HD format turned out to be successful. At the least, this is a topic for discovery.[51]

Furthermore, the proper legal test is whether there are *now* legitimate and lawful economic or technological reasons for Cablevision to carry the HD format of MSG and MSG Plus terrestrially, while at the same time delivering the standard definition format and other HD

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[51] The D.C. Circuit's statement in *EchoStar Communications Corp. v. FCC*, 292 F.3d 749, 755 (D.C. Cir. 2002), that the existence of a "valid business reason" for terrestrial delivery "necessarily precluded holding that Comcast acted to evade the requirements of [Section 628(c)]" is tautological. The question here is whether intended evasion was or is a substantial factor in Cablevision's decision or whether that decision can be explained entirely by "valid business reason[s]." *Cf. Machinchick v. PB Power, Inc.*, 398 F.3d 345, 355 (5th Cir. 2005) ("In a mixed-motive case involving an employment decision based on a mixture of legitimate and illegitimate motives, the plaintiff need only prove that the illegitimate motive was a motivating factor in the decision. Once the plaintiff meets this burden, the employer may seek to avoid liability by proving that it would have made the same employment decision in the absence of the illegitimate discriminatory motive.") (internal quotation marks and citations omitted).

formats via satellite. In that regard, there is good reason to believe that such reasons are lacking. First, RSNs across the country are typically delivered via satellite to ensure the broadest possible distribution. The only RSNs of which AT&T is aware that are terrestrially delivered are vertically integrated. That pattern of distribution of RSN programming – where the vast bulk of programs are delivered via satellite, and the only ones that are not are those that are owned by entities subject to Section 628 of the Cable Act – substantially calls into question Cablevision's case for terrestrial delivery. *See* Reply Decl. ¶ 14.

Second, Cablevision's distribution of other affiliated networks in the HD format via satellite calls into question its justifications for singling out the HD format of MSG and MSG Plus for terrestrial delivery. Many of Cablevision's stated reasons for terrestrial delivery of the HD format of MSG and MSG Plus – for example, "better picture quality"[52] – would apply equally to all Cablevision-affiliated networks. But Cablevision fails to explain why it does not offer all HD channels on a "come and get it basis," *see* Answer at 12 – *i.e.*, requiring licensees to arrange for pickup of terrestrially delivered signals at their own cost and expense. *See* Reply Decl. ¶ 15.

Indeed, not only does Cablevision deliver other HD networks via satellite, Cablevision itself has delivered the HD feeds of other *RSNs* it once owned via satellite. Prior to the sale of Fox Sports Net Bay Area ("FSN Bay Area") to Comcast, Cablevision delivered the HD format of FSN Bay Area via satellite. *See id.* ¶ 16. Cablevision has not explained how the economic and technological case for the delivery of MSG and MSG Plus in the HD format can be squared with Cablevision's prior distribution of FSN Bay Area via satellite. Here again, at a minimum, discovery will be appropriate on each of these issues.

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[52] Declaration of Steven J. Pontillo, *AT&T Services, Inc. v. Madison Square Garden, L.P.*, File No. CSR-8196-P, ¶ 18 (filed Sept. 17, 2009) ("Pontillo Decl.").

VI. AT&T HAS STATED A *PRIMA FACIE* CASE OF UNDUE INFLUENCE

A. AT&T Has Alleged a *Prima Facie* Case With Respect to Count IV

Under Count IV, AT&T has established a *prima facie* case of undue influence. Consistent with Congress's goal of allowing vertical integration while regulating the increased incentives for anticompetitive behavior that vertical integration would create, Section 628(c) and the Commission's implementing rules prevent vertically integrated cable operators from exercising undue and improper influence over the programming decisions of affiliated vendors. As the Commission has explained, "'undue influence'" can be established by showing the exercise of influence "between affiliated firms" with respect to initiating or maintaining "anticompetitive discriminatory pricing, contracting, or product withholding." *First Report and Order* ¶ 145. Here, Cablevision has all but admitted that – through a selective licensing strategy – it has orchestrated Madison Square Garden's decision not to license the HD format of MSG and MSG Plus to AT&T.[53] If the undue influence provision is not to be a dead letter, such conduct must be proscribed by Section 628(c).

B. Cablevision's Contrary Arguments Are Unavailing

Cablevision's first response to Count IV is that the "undue influence" prohibition is limited to "satellite cable programming." *See* Answer at 72. But, as AT&T has explained, the HD format of MSG and MSG Plus is "satellite cable programming." *See supra* pp. 32-36.

In addition, Cablevision argues that AT&T has demonstrated only a "motive and opportunity for Cablevision to engage in undue influence over MSG," not that Cablevision has exercised such influence. Answer at 72-73. But this response is far-fetched in light of

[53] *See, e.g.*, Answer at 13 (explaining Defendants have outright refused to license the HD format of MSG and MSG Plus to AT&T "preferring instead to continue to utilize MSG HD and MSG+ HD as a product differentiator for Cablevision").

Cablevision's Answer. There is no dispute that, if Madison Square Garden were an unaffiliated programmer, then it would have every incentive to license the HD format of this programming to AT&T, *see* AT&T Compl. ¶ 6 n.10, and Cablevision has not denied that the justification for sacrificing such revenues is to benefit Cablevision's distribution arm. That amounts to an admission of improper influence, as it reflects Congress's exact fear that integrated entities would use control over *programming* as a competitive weapon against competing *distributors*. *See* AT&T Compl. ¶ 64. In all events, AT&T is entitled to discovery to understand the full extent and scope of Cablevision's involvement in Madison Square Garden's decision not to license to the HD format of MSG and MSG Plus to AT&T.

Cablevision retreats to the argument that "it is not unlawful for a company to decide that a subsidiary programming service not subject to forced sharing under Section 628 should be used as a competitive differentiator." Answer at 73. But the predicate of Count IV is that the HD format of MSG and MSG Plus *is* subject to Section 628(c). If Cablevision means to suggest that, even if the HD format is "satellite cable programming," Cablevision should be allowed to compel Madison Square Garden to use its programming as a weapon to benefit Cablevision's distribution business, *see id.* at 74-75, Cablevision's quarrel is with the Cable Act itself. Congress has made the policy judgment to allow vertical integration, but to police strictly the programming (and carriage) decisions of integrated entities to ensure that programming is not used as a competitive weapon against rival distributors. *See 2002 Order* ¶ 24 ("In enacting the program access provisions of the 1992 Cable Act, Congress concluded that vertically integrated program suppliers also have the incentive and ability to favor their affiliated cable operators over

nonaffiliated cable operators and programming distributors using other technologies.") (internal quotation marks and alterations omitted); *Adelphia Order* ¶ 39.[54]

VII. THE RELEASE DOES NOT BAR THE COMPLAINT

Cablevision argues that the Commission cannot adjudicate Cablevision's selective refusal to license the HD format of must-have programming to AT&T at all because, it asserts, AT&T "release[d] [Cablevision] from any claim related to access to MSG HD and MSG+ HD." Answer at 18. This argument is wrong.

The text of the release does not encompass claims relating to the HD format of MSG and MSG Plus. The release applies to claims "'arising out of or related to the issues in [the Action – i.e., AT&T's program access complaint] and the negotiation of the Agreement.'" Levine ¶ 10 (quoting release). The issue of HD formats plainly was not part of the prior "Action" – namely, AT&T's 2007 program access complaint against Cablevision. That action did not include any claim remotely bearing on AT&T's right to license the HD format of MSG and MSG Plus; to the contrary, AT&T carefully excluded any such claim in order to expedite resolution of the complaint. *See* AT&T Complaint Ex. 4 (2007 program access complaint); Reply Decl. ¶ 19.

Likewise, as AT&T has already explained and Cablevision has not disputed, the issue of the HD formats of MSG and MSG Plus was expressly carved-out from "negotiation" over the standard definition carriage and settlement agreement, at *Cablevision's* insistence. *See* Joint Decl. ¶ 33 ("During negotiations in the 2005-2007 time period, Rainbow made it clear to AT&T that following the common practice of including HD rights as a term of a carriage agreement would slow down the negotiations and that it was in the interest of the parties to treat access to

[54] Cablevision's claim that "[f]irms routinely opt to forego revenue that might otherwise be gained from licensing an input to non-affiliates in order to benefit another arm of a shared enterprise," Answer at 75, is precisely why Congress elected to allow vertical integration but to regulate the conduct of integrated firms to prevent such conduct in this context.

the HD format of such programming as a *separate matter*. AT&T agreed to this request in light of the imperative of securing access to other Cablevision-affiliated programming services prior to commercial launches of U-verse TV service.") (emphasis added); *see id.* ¶ 34 (noting "each side had agreed to handle HD issues separately after the closure of the original deal"). Because the issue of HD rights was always a "separate matter" from issues negotiated with respect to standard definition networks and from claims raised in the 2007 Complaint, HD rights were neither part of AT&T's prior program access complaint nor were they part of the negotiations leading to or settling that complaint. *See* Reply Decl. ¶¶ 17-24. Furthermore, that the issue of HD rights was raised and then quickly set aside again by the parties during settlement discussions of the 2007 complaint, *see* Levine Decl. ¶ 8, confirms that the issues of HD and standard definition rights were always handled separately and that Cablevision has never negotiated with AT&T with respect to those rights. As a straightforward textual matter, then, the release is no bar to this action.[55] Cablevision understands this: no one from Cablevision raised the release as a reason for refusing to license the HD formats of MSG and MSG Plus to AT&T prior to the Answer. *See* Reply Decl. ¶ 23.

VIII. FORFEITURE IS AN APPROPRIATE REMEDY

AT&T established in its Complaint that Cablevision and its affiliated entities have long used control over programming to deter and slow competitive entry into the video distribution marketplace. As AT&T has also established, Cablevision is doing the same here in contravention of Section 628(b), Section 628(c), and the Commission's program access rules.

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[55] The makeweight nature of this argument is confirmed by Mr. Levine's claim that "satellite-delivered MSG HD and MSG+ services are separately licensed from the terrestrially-delivered MSG and MSG+ HD services." Levine Decl. ¶ 13. If Mr. Levine's claim is accurate, there is no reasonable argument that a release pertaining to standard definition channels would foreclose claims relating to the HD format, which, Mr. Levine asserts, are separately licensed.

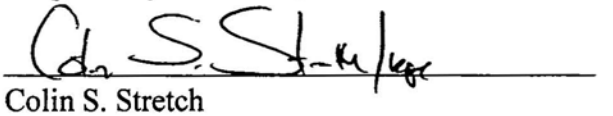
The Commission committed that it would use its forfeiture authority to deter such conduct. *See* AT&T Compl. ¶ 112; 47 U.S.C. § 503(b). The threat of program access and Section 628(b) complaints against Cablevision has proven to be inadequate deterrence: Cablevision has made the considered choice to bear the costs of such proceedings, while settling time and again on the eve of decision in order to avoid adjudicated judgments against it.

What is needed, therefore, is deterrence that is more substantial than merely requiring adherence to the law going forward. As the Commission has said, "[f]orfeitures can be an effective deterrent to anti-competitive conduct," Report and Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd 15822, ¶ 5 (1998), and imposing such remedies here would send a clear message to incumbent cable operators that disregard of Section 628(b), Section 628(c), and the Commission's program access rules will not be tolerated at this crucial time in the development of MVPD competition. A separate forfeiture proceeding is accordingly appropriate.

IX. CONCLUSION

For the foregoing reasons and those set forth in the Complaint, the Commission should expeditiously grant AT&T the relief requested.

Respectfully submitted,



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Attorneys for AT&T

October 2, 2009

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

AT&T SERVICES, INC. AND SOUTHERN NEW ENGLAND TELEPHONE COMPANY D/B/A AT&T CONNECTICUT, INC., Complainants, v. MADISON SQUARE GARDEN, L.P. AND CABLEVISION SYSTEMS CORP., Defendants.

File No. CSR-8196-P

VERIFICATION OF CHRISTOPHER M. HEIMANN

I have read AT&T's Reply in Support of Program Access and Section 628(b) Complaint ("Reply") in this matter and, pursuant to 47 C.F.R. § 76.6(a)(4), state that, to the best of my knowledge, information, and belief formed after reasonable inquiry, the Reply is well grounded in fact and is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law. The Reply is not interposed for any improper purpose.

Christopher M. Heimann

October 2, 2009

CERTIFICATE OF SERVICE

I, James F. Birmingham, hereby certify that on this 2nd day of October 2009, copies of the foregoing AT&T's Reply in Support of Program Access and Section 628(b) Complaint were served upon the parties listed on the attached service list by overnight delivery.

James F. Birmingham

SERVICE LIST

Organization	Address
Cablevision Systems Corp.	Jonathan D. Schwartz General Counsel Cablevision Systems Corp. 1111 Stewart Avenue Bethpage, NY 11714
Madison Square Garden, L.P.	Lucinda Treat General Counsel Madison Square Garden, L.P. Two Penn Plaza, 8th Floor New York, NY 10121
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.	Howard J. Symons Christopher J. Harvie Ernest C. Cooper Stefanie Z. Desai 701 Pennsylvania Avenue, NW Suite 900 Washington, DC 20004

Exhibit 1

REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

AT&T SERVICES, INC. AND SOUTHERN NEW ENGLAND TELEPHONE COMPANY D/B/A AT&T CONNECTICUT, Complainants, v. MADISON SQUARE GARDEN, L.P. AND CABLEVISION SYSTEMS CORP., Defendants.	File No. CSR-8196-P

JOINT REPLY DECLARATION IN SUPPORT OF PROGRAM ACCESS AND SECTION 628(b) COMPLAINT

1. My name is Rob Thun. My business address is 1880 Century Park East, Suite 1101, Los Angeles, CA 90067. As I explained in the initial declaration accompanying AT&T's complaint in this matter,[1] since July 2005, I have held the position of Senior Vice President – Content and Programming for AT&T. In my position, I am responsible for acquiring video content for AT&T's platforms (primarily for AT&T's U-verse TV service). Before joining AT&T, I was employed for more than 7 years at Fox Cable Networks where I last served as Vice President, National Accounts, Strategy and Development. I am responsible for paragraphs 5-13, 15-16, 22 of this reply declaration.

2. My name is J. Christopher Lauricella. My business address is 1880 Century Park East, Suite 1101, Los Angeles, CA 90067. As I explained in the initial declaration, since 2005, I

[1] *See* Joint Declaration in Support of Program Access and Section 628(b) Complaint, *AT&T Services, Inc. v. Madison Square Garden, L.P.*, File No. CSR-8196-P (Ex. 2 to AT&T Compl.) (filed Aug. 13, 2009).

have held the position of Vice President for AT&T Operations. In my position, I am responsible for acquiring video content for U-verse video service. I am responsible for paragraph 14 of this reply declaration.

3. My name is Tom Rawls. My business address is 1025 Lenox Park Blvd., Suite C562, Atlanta, GA 30319. Since early March 2007, I have held the position of General Attorney – Entertainment Counsel for AT&T. In my position, I am responsible for providing legal advice and support to company officers and managers responsible for AT&T's content acquisition strategy and the negotiation of related third-party content licenses for AT&T's various distribution platforms, including the U-verse TV service. I am responsible for paragraphs 17-21, 23-24 of this reply declaration.

4. This reply declaration is filed in connection with AT&T's program access and Section 628 complaint against Cablevision Systems Corp. ("Cablevision") and Madison Square Garden, L.P. ("Madison Square Garden") (collectively, "Defendants"). We have read Defendants' Answer and relevant parts of the declarations of Adam Levine, Steven Pontillo, and Jeremy Bulow and Bruce Owen. This reply declaration addresses four topics: (1) the demonstrated effects of Defendants' withholding of the high-definition ("HD") format of MSG and MSG Plus in Connecticut; (2) the must-have status of RSN programming generally; (3) the purported economic and technological justifications for the terrestrial delivery of the HD format of MSG and MSG Plus; and (4) the negotiations leading to the 2007 program access complaint by AT&T and the subsequent settlement of claims in that complaint.

Effect of Withholding the HD Format of MSG and MSG Plus on AT&T in Connecticut

5. The initial declaration established that the importance of regional sports network ("RSN") programming in HD format is evidenced by AT&T's performance in selling its HD

product in Connecticut as compared to the rest of the country. As explained in that declaration, in the parts of Connecticut where AT&T offers U-verse TV service, the penetration of its HD product is **[[begin highly confidential]]** **[[end highly confidential]]**. In the other Nielsen designated market areas where AT&T offers its U-verse TV service, the penetration of its HD product is **[[begin highly confidential]]** **[[end highly confidential]]**. The performance of AT&T's HD product in Connecticut is thus **[[begin highly confidential]]** **[[end highly confidential]]** worse than in the rest of the country. As explained, these data likely understate the competitive significance of Defendants' denial of the HD format of MSG and MSG Plus to AT&T: because the HD product is typically purchased by higher income households and because Connecticut has the third highest median household income of any state in the nation and the highest of any state in AT&T's territory,[2] the penetration of AT&T's HD product should be much higher in Connecticut than elsewhere. Indeed, census data establish that the per capita income in Connecticut is 22% higher than the rest of AT&T's footprint and that the average household income is 15% higher than the rest of AT&T's footprint. These numbers confirm that the penetration of AT&T's HD product in Connecticut should be higher, not lower, than elsewhere.

6. In response, Defendants assert that factors other than AT&T's non-carriage of the HD format of MSG and MSG Plus – such as "pricing, characteristics of the service, marketing

[2] *See* U.S. Census Bureau, *Median Household Income (In 2007 Inflation-Adjusted Dollars*), *available at* http://factfinder.census.gov/servlet/GRTTable?_bm=y&-_box_head_nbr=R1901&-ds_name=ACS_2007_1YR_G00_&-_lang=en&-format=US-30&-CONTEXT=grt.

efforts, demographics, and competitive alternatives"[3] – may explain the underperformance of AT&T's HD product in Connecticut. I have investigated Defendants' alternative explanations and concluded that they are not credible. The price of AT&T's HD product in Connecticut is the same price of its HD product across the rest of AT&T's territory. The nature of AT&T's HD product also is generally the same across the rest of AT&T's territory (with the obvious exception of the lack of the HD format of must-have RSN programming in Connecticut and differences due to differing local broadcast content), and AT&T offers a robust HD lineup in Connecticut. Furthermore, AT&T's marketing efforts in Connecticut are on par with its efforts elsewhere. In addition, demographic factors – as explained above – suggest that the penetration of AT&T's HD product should be much higher in Connecticut given the high median household income of Connecticut residents. Finally, AT&T faces competition from cable incumbents in each market in which it competes – there is nothing unique about "competitive alternatives" in Connecticut that would explain AT&T's relatively low HD penetration relative to such other markets other than the fact that AT&T is denied RSN programming in the HD format.[4]

7. In addition, Defendants are wrong to suggest that consumers' purported concerns with AT&T's HD quality explain AT&T's underperformance in the sale of its HD product in

[3] Jeremy I. Bulow and Bruce M. Owen, *Analysis of Competition and Consumer Welfare Issues in AT&T's Program Access and 628(b) Complaint Against Cablevision and Madison Square Garden* at 9 (attached as Ex. 1 to Cablevision Answer) ("Bulow & Owen").

[4] In fact, AT&T offers a more robust HD lineup in Connecticut and at a better price than all of its cable competitors (including Cablevision, Charter, Comcast, and Cox). In the New York DMA, AT&T offers up to 118 HD channels as compared to the 104 HD channels Cablevision offers and the 42 HD channels Comcast offers. In the Hartford & New Haven DMA, AT&T offers up to 120 HD channels versus the 69 HD channels Cox offers and the 34 HD channels Charter offers. As also compared to the cable competition in Connecticut, the price for U-verse TV service is lower than the comparable cable product packages (taking into consideration all related equipment and HD charges) of each cable competitor.

Connecticut.[5] For one thing, AT&T's HD penetration data are relative: they establish that AT&T is underperforming in Connecticut as compared to other states where AT&T makes its HD product available. If there were any consumer concerns with HD picture quality – and there are none – such concerns would apply across AT&T's footprints and would not explain the *relatively* low penetration rate of AT&T's HD product in Connecticut. In all events, the only "evidence" Defendants cite in support of their claim is an online user forum poll – which Defendants themselves describe as "not scientific."[6] There is no need, however, to rely on such unreliable information. Independent reports of JD Powers confirm that overall customer satisfaction with U-verse – including HD quality – is high; in fact, U-verse service has been ranked first in customer satisfaction in every region in which it is ranked. **[[begin highly confidential]]**

[[end highly confidential]]

8. Finally, Defendants suggest that because AT&T has been successful with respect to penetration of its standard definition service in Connecticut, the denial of MSG and MSG Plus

[5] *See* Answer to Program Access Complaint, *AT&T Services, Inc. v. Madison Square Garden, L.P.*, File No. CSR-8196-P, at 51-52 (Sept. 17, 2009) ("Answer").

[6] *Id.* at 51 & n.190.

in the HD format has not hindered AT&T's ability to compete. But that does not follow. That there are some customers, even many customers, for whom regional sports programming is not important is neither in dispute nor relevant. The relevant point, which I do not understand Cablevision to be disputing, is that there is *also* a significant number of sports fans for whom regional sports programming is a priority, who are a driving force behind the demand for HD content, and for whom the must-have format of must-have RSN programming is critical. It follows from this that AT&T's ability to win and keep subscribers in Connecticut is substantially impaired by Cablevision's refusal to license the HD format of MSG and MSG Plus notwithstanding that AT&T has had some success in attracting other subscribers in Connecticut. That is especially the case given that demand for the HD format will only increase as HDTVs spread, as they certainly will. Indeed, according to a Forrester Research report, 71% of households will have at least one HDTV and more than half will have two or more, by 2014.[7]

Must-Have Status of RSN Programming Generally

9. I also understand that Defendants have argued the HD format of RSN programming is not must-have as a general matter. That is incorrect. As explained in the initial declaration, AT&T's experience in the marketplace confirms what this Commission has long held: to compete effectively, MVPDs must provide subscribers with RSN programming. Other types of programming, such as game shows, films, or general news programming, are not substitutes for RSN programming. Even national sports networks such as ESPN are not sufficient in themselves for a new-entrant MVPD to compete effectively, because fans are used

[7] *See* Executive Summary of James L. McQuivey, Ph.D., et al, Forrester Research, *US HDTV Forecast, 2009 To 2014: Multi-HDTV Owners Become The Default Buyers* (Sept. 3, 2009), *available at* http://www.forrester.com/Research/Document/Excerpt/0,7211,53559,00.html.

to seeing their favorite local sports teams on the incumbent cable or satellite provider's service, and they generally will not leave that service for a new provider that does not offer the same popular games. Furthermore, it is not enough to provide this programming in the standard definition format: studies that Defendants do not seriously contest demonstrate the competitive significance of HD sports programming.[8] For that reason, RSN programming in the HD format is must-have. Defendants' decision to single out the HD format of RSN programming as programming it will not provide to AT&T is clear evidence of this.

10. In the face of this evidence, Defendants suggest that a ratings comparison between the HD format of MSG and MSG Plus and standard definition channels evidences that the HD format of MSG and MSG Plus is not must-have.[9] Although Defendants do not submit this ratings information – making it impossible to analyze the comparison – the comparison likely is misleading. If the ratings are measured as a ratio to television households, for example, a comparison of HD and standard definition channels would be comparing apples and oranges. All televisions are capable of receiving standard definition channels, but it takes an HDTV to view HD channels. Lower ratings for HD channels as compared to standard definition channels are thus to be expected, as there are far fewer potential viewers who could watch an HD channel. At a minimum, without an understanding of the relevant ratio on which the ratings are based, Defendants' conclusory ratings comparison is uninformative.

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[8] *See* Consumer Electronics Association, *Second Annual Inside the Mind of the HD Sports Fan Study* at 3 (January 2007) (excerpts attached as Ex. 7 to the Complaint); Consumer Electronics Association Press Release, *Sports Fans Drive HD Television Sales According to New Survey* at 1 (Jan. 17, 2006), *available at* http://www.ce.org/shared_files/pr_attachments/20060110_SVG_survey.doc.

[9] *See* Answer at 45-46.

11. Furthermore, many of the standard definition channels that Defendants point to already are available broadly to MVPDs and are carried by AT&T (as well as Cablevision). In choosing between or among MVPDs, therefore, a sports fan who demands the HD format of sports programming is likely to assign a high value to Cablevision's carriage of the HD format of MSG and MSG Plus even if the ratings for those channels are not high compared to other programming. Indeed, presumably the only reason that Cablevision is denying the HD format of MSG and MSG Plus to AT&T is to gain a marketplace advantage.

12. In all events, ratings are a single consideration in a mix of factors that affect the importance of a channel to an MVPD: the uniqueness and fungibility of the programming as well as the intensity of viewer interest (factors that make RSNs' programming particularly attractive) are crucial. As explained above, it may well be the case that for many subscribers sports programming in the HD format is of low interest; the key point is that there is a sizeable number of subscribers who do care and care intensely. For that universe of subscribers, the HD format of RSN programming is a make or break decision – as Cablevision obviously is aware in light of its extensive marketing campaign trumpeting its carriage of HD sports programming.

Terrestrial Delivery of HD Programming

13. In their Answer and accompanying declaration, Defendants also contend that they have legitimate justifications for the terrestrial delivery of the HD format of MSG and MSG Plus and that the evasion of program access obligations was not or is not a factor in delivering this programming terrestrially.[10] Defendants' claim that a desire to evade program access obligations has played no role, or does not play a role, in its decisionmaking is not credible for several reasons.[11]

14. First, RSNs across the country are typically delivered via satellite to ensure the broadest possible distribution. In fact, to AT&T's knowledge, almost all major RSNs are delivered via satellite (whether in the HD or standard definition format).[12] The only RSNs of which AT&T is aware that are terrestrially delivered are vertically integrated: the HD format of MSG and MSG Plus; Comcast SportsNet Philadelphia (Comcast-affiliated); Channel 4 San Diego (Cox-affiliated); and Metro Sports (Time Warner Cable-affiliated). That pattern of distribution of RSN programming – where the vast bulk of programs are delivered via satellite,

[10] *See* Answer at 70-71; Declaration of Steven J. Pontillo, *AT&T Services, Inc. v. Madison Square Garden, L.P.*, File No. CSR-8196-P, ¶¶ 3-20 (filed Sept. 17, 2009) (attached as Ex. 2 to Answer) ("Pontillo Decl.").

[11] *See* Pontillo Decl. ¶ 20 (asserting that "[t]here was – and to this day still is – no viable business case to support satellite delivery of MSG HD and MSG+ HD").

[12] In addition to the standard definition channels of MSG and MSG Plus, those RSNs are: Fox Sports Arizona; Fox Sports South; SportSouth; Fox Sports Detroit; Fox Sports Florida; SUN Sports; Fox Sports Southwest; Fox Sports Houston; Fox Sports Midwest; Fox Sports Midwest/Illinois; Fox Sports North; Fox Sports Ohio; Prime Ticket; Fox Sports West; Fox Sports Northwest; Fox Sports Pittsburgh; Fox Sports Rocky Mountain; Comcast SportsNet Bay Area; Comcast SportsNet Chicago; Comcast SportsNet New England; Comcast SportsNet California; SportsNet New York; Comcast SportsNet Mid-Atlantic; Comcast SportsNet Northwest; Comcast/Charter Sports Southeast; The Mtn. – MountainWest Sports Network; Cox Sports Television - New Orleans; Altitude Sports & Entertainment; Mid-Atlantic Sports Network; New England Sports Network; Sports Time Ohio; and Yankees Entertainment and Sports.

and the only ones that are not are those that are owned by entities subject to Section 628(c) of the Cable Act – substantially calls into question Defendants' case for terrestrial delivery. Furthermore, although Defendants state that satellite delivery did not make sense at the time when the HD format of MSG and MSG Plus was developed (because of a purported lack of demand for the HD format), that is no explanation for why satellite delivery would not make sense today – as it does for the vast majority of RSNs – when the HD format of RSN programming *is* in high demand.

15. Second, Defendants' distribution of other affiliated networks in the HD format via satellite calls into question Defendants' justifications for singling out the HD format of MSG and MSG Plus for terrestrial delivery. Many of Defendants' stated reasons for terrestrial delivery of the HD format of MSG and MSG Plus – for example, "better picture quality"[13] – would apply equally to all of Defendants' networks. But Defendants fail to explain why they do not offer all of their HD channels on a "come and get it basis" – requiring licensees to arrange for pickup of terrestrially delivered signals at their own cost and expense.

16. In fact, not only do Defendants deliver other HD networks via satellite, Cablevision itself has delivered the HD feeds of other *RSNs* it once owned via satellite. Prior to the sale of Fox Sports Net Bay Area ("FSN Bay Area") – an RSN in the San Francisco area – to Comcast, Cablevision delivered the HD format of FSN Bay Area via satellite. Defendants have not explained how the economic and technological case for the delivery of MSG and MSG Plus in the HD format can be squared with Defendants' prior distribution of FSN Bay Area via satellite.

[13] Pontillo Decl. ¶ 18.

Negotiations Prior to the 2007 Complaint and Settlement

17. The initial declaration establishes that HD rights were never part of the negotiations leading up to AT&T's 2007 program access complaint against Cablevision, nor were they part of the claims asserted in the 2007 complaint. Nevertheless, Defendants have argued that AT&T released all claims to HD rights in settling that complaint. Defendants are wrong.

18. The release applies to issues that were negotiated or part of the 2007 complaint. Specifically, it applies to claims "arising out of or related to the issues in [the Action – i.e., AT&T's program access complaint] and the negotiation of the Agreement."[14]

19. The question of Cablevision's obligation to license the HD format of MSG and MSG Plus on reasonable terms was not part of the 2007 program access complaint (i.e., the "Action"), and Cablevision does not contend otherwise. It should be equally clear that AT&T and Defendants never "negotiat[ed]" over HD rights. From the beginning of the parties' discussions, the issue of HD rights was set aside on a separate track – at Defendants' insistence – from discussions regarding standard definition channels. In standard English and industry practice, "negotiation" involves a give and take of proposed terms and conditions of carriage. But such "negotiation" never occurred with respect to HD rights: Although AT&T wanted to engage in such negotiations, Defendants outright refused to do so. It was, in short, a "refusal to negotiate," not a "negotiation," on the part of Defendants.

20. Thus, as explained in the initial declaration, during discussions in the 2005-2007 time period, Rainbow made it clear that including HD rights as a term of a carriage agreement

[14] Declaration of Adam Levine, *AT&T Services, Inc. v. Madison Square Garden, L.P.*, File No. CSR-8196-P, ¶ 10 (filed Sept. 17, 2009) (quoting release) (attached as Ex. 3 to Answer) ("Levine Decl.").

would derail the negotiations and that it was in the interest of the parties to treat access to the HD format of such programming as a separate matter. AT&T agreed to this request in light of the need to secure access to other Cablevision-affiliated programming services prior to commercial launches of U-verse TV service. Defendants have not disputed this version of events.

21. Furthermore, as also explained in the initial declaration, during a June 12, 2007 conference call, Mr. Levine acknowledged that each side had agreed to handle HD issues separately after the closure of any original deal in light of AT&T's desire to get to the market quickly in the San Francisco area. Mr. Levine stated, however, that Rainbow would not license the HD format of MSG and MSG Plus because, he stated, the HD format was delivered terrestrially and was thus outside the scope of the program access rules. To be sure, AT&T made clear to Rainbow at that time that AT&T was very interested in working out a business arrangement to secure access to the HD format of all RSN programming (including MSG and MSG Plus), but, at Rainbow's insistence, AT&T agreed *not* to negotiate terms for such access at that point in time and to set the issue aside for the time being. Once again, Defendants have not disputed this version of events.

22. The fact that HD issues were separate from standard definition issues was confirmed during settlement of the prior complaint. In October 2007, AT&T raised the issue of the HD format of MSG and MSG Plus, but Defendants again refused to negotiate this issue on the ground that the HD format is delivered terrestrially. AT&T disagreed with but ultimately acquiesced in Rainbow's desire to exclude the issue from the scope of any settlement and any related settlement discussions. This exchange thus confirms that HD rights were never part of the "negotiations" that settled the 2007 complaint – indeed, at Cablevision's insistence, they were expressly and affirmatively excluded from such negotiations.

23. In fact, in discussions with Defendants after the 2007 settlement, but prior to the filing of the Answer, no one from Cablevision ever suggested that AT&T released any claim to the HD rights of any programming, much less the HD rights to MSG and MSG Plus.

24. Finally, Mr. Levine has stated that Tom Rawls agreed in June 2007 that Defendants were not legally obligated to license the HD format of MSG and MSG Plus to AT&T.[15] This statement reflects, at best, a misunderstanding of Mr. Rawls' statement. The June 2007 conversation occurred after AT&T had sent a 10-day notice letter to Defendants informing them of a potential program access complaint but before AT&T had filed the complaint. In that conversation, Mr. Rawls clarified that HD rights were not part of AT&T's 10-day notice letter and thus would not be a subject of the 2007 complaint. As part of that brief exchange, Mr. Rawls acknowledged only that he understood Defendants' legal position on the issue as stated by Mr. Levine, not that he agreed with it. Those statements are entirely consistent with the fact that HD rights had been excluded, at Cablevision's insistence, from negotiations over standard definition channels and would accordingly be excluded from the program access complaint that resulted from those negotiations.

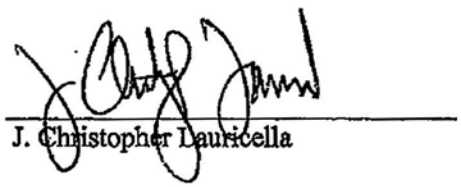
[15] *See* Levine Decl. ¶ 7.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Rob Thun

Executed on October 2, 2009

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.



J. Christopher Lauricella

Executed on October 1, 2009

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Tom Rawls

Tom Rawls

Executed on October 1st, 2009